Supreme Court, U.S.
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CASE NO. _____

SUPREME COURT OF THE UNITED STATES
(October 1996 to October 1997 Term)

STANLEY D. SCHEETZ, TRUSTEE OF THE SEVILLE CORPORATE PARK SUBDIVISION TRUST U/A DATED DECEMBER 1, 1988

Appellant

v.

THE VILLAGE OF SEVILLE, OHIO

Appellee

ON PETITION FOR WRIT OF CERTIORARI TO THE MEDINA COUNTY APPEALS COURT, NINTH JUDICIAL DISTRICT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is it proper for Ohio Courts to refuse to recognize an Ohio private property owner's United States Constitution, Fifth Amendment "takings" rights as pronounced by the United States Supreme Court and instead recognize only Ohio State Constitutional "takings" rights as pronounced by the Ohio Supreme Court when the Ohio "taking" rights offer the private property owner less constitutional protection than the Federal "takings" rights?

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3. Stanley Scheetz, Trustee v. Village of Seville, Ohio Decision and Journal Entry dated August 21, 1996, filed in the Medina County Court of Appeals, Ninth Judicial District, Case No. 2482-M, unreported.

4. Stanley Scheetz, Trustee v. Village of Seville, Ohio Entry filed January 15, 1997 in the Supreme Court of Ohio, Case No. 96-224. Stanley Scheetz, Trustee v. Village of Seville, Ohio, 77 Ohio St. 3d 1516, 674 N.E. 2d 370 (1994).

CONCISE STATEMENT OF JURISDICTIONAL BASIS

The order sought to be appealed from is the Supreme Court of Ohio's Entry filed January 15, 1997, denying jurisdiction to hear the case and dismissing the appeal as not involving any substantial constitutional question. The last order ruling on the merits of the case was the Stanley Scheetz, Trustee v. Village of Seville, Ohio, Decisions and Journal Entry dated August 21, 1996, filed in the Medina County Court of Appeals, Ninth Judicial District, Case No. 2482-M, unreported. There is no order respecting rehearing or granting an extension of time to file this Petition for a *Writ of Certiorari*.

STATUTORY PROVISIONS CONFERRING JURISDICTION TO THE U.S. SUPREME COURT TO REVIEW THE ORDER IN QUESTION

1. Rule 10(a)(b) and (c) of the U.S. Supreme Court Rules.

2. Fifth Amendment to the U.S. Constitution.

3. Fourteenth Amendment to the U.S. Constitution.

4. Article VI Clause 2 of the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES, ETC. INVOLVED IN THE INSTANT CASE AND SET OUT VERBATIM

1. United States Constitution Article VI Clause 2 Supremacy Clause:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. United States Constitution Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. United States Constitution Fourteenth Amendment:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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I. STATEMENT OF FACTS

Stanley Scheetz, Trustee of the Seville Corporate Park Subdivision Trust (Mr. Scheetz) is the owner of certain undeveloped land (Undeveloped Land) in the Village of Seville, Ohio (Appellee). The Undeveloped Land was zoned commercial according to the Defendant's then applicable zoning code.[1] Mr. Scheetz, relying on the broad range of uses allowed by the commercial zoning of the Undeveloped Land purchased the Undeveloped Land on December 1, 1988 for $275,000. Mr. Scheetz then platted the Undeveloped Land and immediately began marketing the property for sale as commercial property and investing money in infrastructure improvements such as streets, waterlines and sewers capable of handling a broad range of commercial uses.[2]

On January 1, 1990, Appellee enacted a new zoning ordinance (Zoning Ordinance). Just prior to its enactment, a village council member added language for a new zoning district into the Zoning Ordinance entitled "Highway Service Commercial District" (HSCD).[3] However, no change or amendment was made to the zoning district map (Zoning District Map) which designated the land to be

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[1] This commercial zoning broadly allowed all commercial uses.

[2] As of trial, Mr. Scheetz had invested approximately $648,000 in infrastructure improvements and interest. Mr. Scheetz' engineers estimated another $350,000 to complete the road improvements.

[3] The language of the HSCD section strictly limited the use of potential HSCD land to the following permitted uses: (a) gasoline filling stations; (b) garage and automotive repair shops (c) restaurants and eating places; (d) motels; (e) signs; (f) parking and loading; and (g) accessory uses clearly incidental to the above uses. These uses will be referred to herein as "Highway Service Uses".

included in each of the various zoning districts. Mr. Scheetz' Undeveloped Land remained commercial. In 1992 the Zoning District Map was physically changed at the insistence of one village council member to change the zoning of the Undeveloped Land from commercial to HSCD. However, this change occurred without notice, without public discussion or debate and without official action or vote by Apellee's planning commission or council.

Except for a lot sold to Hardee's Restaurants (Lot No. 763), Mr. Scheetz has been unable to sell any of the remaining Undeveloped Land in an arm's length transaction for any Highway Service Uses and has not been able to use the remainder of the Undeveloped Property for any economically viable use. Mr. Scheetz attempted to market, sell or use the Undeveloped Property for Highway Service Uses, but was unable to do so. Mr. Scheetz attempted to obtain zoning amendments allowing commercial uses that he once had, but was denied. Additionally, he tried to obtain multifamily uses by amendments to the Zoning Ordinance, but was again denied. Because of the overly restrictive HSCD Zoning applied to the Undeveloped Land without proper legislative action, Mr. Scheetz has been unable to recover his investment in the property.

On November 29, 1993, Mr. Scheetz filed his Complaint for Declaratory Judgment and Money Damages for the unconstitutional regulatory "taking" of his property under the Ohio and United States Constitutions. On September 6, 1994, Mr. Scheetz filed his Amended Complaint requesting the Trial Court issue its Declartory Judgment that the Zoning Ordinance is unconstitutional and unlawful in general and as it is applied to the Undeveloped Land under both the Ohio and United States Constitutions. Mr. Scheetz filed a motion for Summary Judgment on

October 25, 1994. In his Motion for Summary Judgment Mr. Scheetz argued on pages 10 and 11 that the Trial Court apply the two part federal disjunctive test as this Court set forth in *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed. 2d 106, (1980) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L. Ed. 2d 798, (1992). Appellee filed a Counter Motion for Summary Judgment and argued that the conjunctive test set forth by the Ohio Supreme Court in *Gerijo, Inc. v. Fairfield*, 70 Ohio St. 3d 223, 638, N.E.2d 533 (1994) should be applied instead of the federal test. In his Memorandum in Opposition Mr. Scheetz again argued on pages 3 and 4 as follows:

> Mr. Scheetz' argument is that the Zoning Ordinance violated the Ohio Constitution as applied to the Undeveloped Property because the Highway Service Uses are not economically viable **and** do not advance a ligitament governmental interest. *Gerijo, Inc. v. Fairfield,* 70 Ohio St. 3d 223. The Zoning Ordinance further violates the U.S. Constitution because the Highway Service Uses are not economically viable **or** do not advance a ligitament government interest. *Agins v. Tiburon* (1980), 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed. 2d 106.

The Trial Court denied Mr. Scheetz' Motion for Summary Judgment and Appellees Motion for Summary Judgment since material factual issues existed. See Findings and Order marked as Exhibit A of the Appendix. The Trial Court then conducted a bench trial held on June 6 through June 9 and July 5, 1995. The pleaded declaratory judgment claims and

a procedural due process issue concerning the unadopted zoning district map were tried.[4]

At trial, counsel for Mr. Scheetz argued that the trial court apply this honorable Court's holdings in *Lucas*, 505 U.S. 1003, and *Agins*, 447 U.S. 255. See pages 561, 580, 581 of the Trial Court transcript marked as Exhibit E to the Appendix.

On September 12, 1995, the Trial Court filed its final Findings and Order in favor of Appellee. The Trial Court failed to apply the *Lucus* and *Agins* decisions and instead applied the conflicting law pronounced in the majority opinions of the Ohio Supreme Court cases of *Gerijo, Inc.*, 70 Ohio St. 3d 223, 638 N.E.2d 533 and *Central Motors Corporation v. City of Pepperpike*, 73 Ohio St. 3d 581, 653 N.E.2d 639 (1995). See Findings and Order Marked as Exhibit B to the Appendix.

On September 21, 1995 Mr. Scheetz filed his appeal with the Medina County Appeals Court. Mr.

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[4] The Zoning Ordinance was adopted in December of 1989, but the Undeveloped Land remained in the regular commercial zoning district according to the then existing zoning district map. The zoning district map which classified Mr. Scheetz' Undeveloped Land as HSCD property was not drafted until 1992. This zoning district map was never voted upon or enacted with legislation. This suit was brought in November of 1993 approximately one year after the new zoning district map was first created and Mr. Scheetz first discovered the change of zoning on the Undeveloped Property. The trial court failed to rule on the due process issues apparently refusing to apply Ohio's "discovery rule" to Ohio's 2 year statute of limitations regarding procedural deficiencies in the enactment of zoning ordinances and apparently held that the procedural violation occurred in December of 1989 when the Zoning Ordinance adding the HSCD language was enacted without an updated map. The procedural due process issue was therefore held to have been barred by the applicable statute of limitations.

Scheetz argued in his appeal brief that the Trial Court erred since it was bound to follow the U.S. Supreme Court decisions which provided more constitutional protection to Mr. Scheetz than the *Gerijo* and *Central Motors* cases. See pages 8-10 of Brief of Plaintiff-Appellant marked as Exhibit F to the Appendix. The Appellee responded by arguing that the Trial Court correctly applied the *Gerijo* and *Central Motors* cases instead of *Lucas* and the Fifth Amendment to U.S. Constitution because *Lucas* and the Fifth Amendment of the U.S. Constitution only provide for a remedy in cases where there is a "complete taking". In Mr. Scheetz' Brief in Reply, Mr. Scheetz argued that this position was void of merit because:

> (1) The outcome of the court's determination under the Federal standard is not the issue on this appeal. This appeal only concerns whether the Federal disjunctive test should have been used to determine the outcome; (2) *Lucas* and the instant case are in no way distinguishable since both concern a regulatory taking that left the owner's lands economically idle; (3) In neither Central Motors nor Gerijo do the majority opinions address the obvious conflict between Ohio's conjunctive test and the Federal disjunctive test; (4) In determining a "complete taking" of property has occurred, the Federal decisions require the court to consider the property owner's "investment backed expectations." Lucas at 2903, see e.g. Kaiser Aetna v. United States (1979), 444 U. S. 164, 175. This factor clearly weighs in Mr. Scheetz'

> favor yet the Trial Court failed to consider it; and (5) **Lucas and the Fifth Amendment to the U.S. Constitution apply to all takings cases!** Mr. Scheetz has asserted the same in his case throughout the pleading, discovery and trial stages.[5] See Pages 3 and 4 of Mr. Scheetz' Reply Brief, marked as Exhibit G to the Appendix.

On August 21, 1996 the Medina County Appeals court denied Mr. Scheetz' appeal on the basis that it was bound to follow Ohio Supreme Court Law instead of U.S. Supreme Court Law. The Medina County Appeals Court stated on pages 3 and 4 of its opinion:

> Rather than following the Ohio Supreme Court's conjunctive tests, requiring a challenger to prove both elements, Scheetz asks us to follow the federal disjunctive test, which would require him to prove only one element or the other. See *Agins v. Tiburon* (1980), 447 U.S. 255, 260, 65 L.Ed. 2d 106, 112. This position, that Ohio Courts should employ a conjunctive test, was taken by the concurring and dissenting opinions in *Cent. Motors Corp. v. Pepper Pike* (1995), 73 Ohio St. 3d 581, 588-590 (*Wright*, J., concurring in judgment only), 590 (Pfeifer, J., dissenting).

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[5] See, also, part IV of Mr. Scheetz' Reply Brief marked as Exhibit G to the Appendix.

> The majority opinion in *Central Motors*, however, reaffirmed that the appropriate test in Ohio is the conjunctive test set forth in the syllabus of *Gerijo, Id.* at 584. We are bound to follow the syllabus law of the Ohio Supreme Court and have no jurisdiction to reverse or modify it. *Love v. Motorist Mut. Ins. Co.* (1993), 86 Ohio App. 3d 394, 400; *Thacker v. Bd. of Trustees of Ohio State Univ.* (1971), 31 Ohio App. 2d, 17, 21. Therefore, the Trial Court did not err in applying the *Gerijo* conjunctive test. The first assignment of error is overruled. See Decision and Journal of the Medina County Court of Appeals marked as Exhibit C to the Appendix.

On October 4, 1996, Mr. Scheetz filed his petition for *Certiorari* with the Ohio Supreme Court. Mr. Scheetz again argued that the trial court, was bound by the Supremacy Clause of the U. S. Constitution to apply this honorable Court's decisions instead of the lesser protections afforded in *Gerijo* and *Central Motors*. See Memorandum In Support of Jurisdiction of Appellant, Stanley D. Scheetz, Trustee (filed with the Ohio Supreme Court), marked as Exhibit H to the Appendix. The Ohio Supreme Court filed its order on January 15, 1997 denying jurisdiction to hear the case and dismissing the appeal as not involving a substantial constitutional question.[6] See Entry of the Supreme Court of Ohio

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[6] It is unclear how the Ohio State Supreme Court could have dismissed the appeal as not involving a substantial constitutional question. Since it rendered no opinion, this question remains unanswered.

Denying Certiorari marked as Exhibit D to the Appendix.

II. QUESTION PRESENTED FOR REVIEW:

Is it proper for Ohio Courts to refuse to recognize an Ohio private property owner's United States Constitution, Fifth Amendment "takings" rights as pronounced by the United States Supreme Court and instead recognize only Ohio State Constitutional "takings" rights as pronounced by the Ohio Supreme Court when the Ohio "takings" rights offer the private property owner less constitutional protection than the Federal "takings" rights?

A. The Medina County Common Pleas Court, the Medina County Court of Appeals, and the Ohio Supreme Court have decided an important constitutional question in a way that conflicts with relevant decisions of the U.S. Supreme Court.

The Medina County Appeals Court in the instant case upheld the Trial Court's application of the Ohio Supreme Court's recent holdings in *Gerijo* and *Central Motors* since it stated that it was bound to follow Ohio Supreme Court precedent instead of United States Supreme Court precedent. In *Gerijo* and *Central Motors* the Ohio Supreme Court has decided an important federal question in a way that conflicts with relevant and binding decisions of this honorable Court.

In the instant case Mr. Scheetz alleged in his complaint and argued throughout the course of trial that the actions of the Appellee constituted an unconstitutional "taking" of Mr. Scheetz' property under the Ohio Constitution **and** the Fifth

Amendment to the United States Constitution. There is a substantial difference in the constitutional protection afforded under each of these constitutions. The Fifth Amendment of the United States constitution states in pertinent part: "***nor shall private property be taken for public use, without just compensation." This honorable Court, in interpreting and applying this portion of the Fifth Amendment of the U.S. Constitution, has offered substantially more protection to property owners regarding "regulatory takings" cases than the Ohio Supreme Court has afforded property owners under the Ohio Constitution in its *Gerijo* and *Central Motors* cases. Because of *Gerijo* and *Central Motors*, Ohio real property owners, such as Mr. Scheetz, are not afforded the benefits of their U.S. Constitutional rights as pronounced by this Court in cases such as *Lucas* and *Agins*.

In *Gerijo* and *Central Motors* the Ohio Supreme Court applied a **conjunctive** two part analysis to decide the constitutional validity of zoning regulations in Ohio. This two prong analysis requires the landowner alleging the "taking" to show that the zoning classification denies his or her property of its economic viability **and** does so without advancing legitament government interests. *Gerijo*, 70 Ohio St. at 228, 638 N.E.2d 533 and *Central Motors*, 73 Ohio St. at 584, 653 N.E.2d 639.[7]

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[7] Additionally, under Ohio's conjunctive test, Ohio property owners are saddled with the burden of proving both elements "beyond fair debate." *Gerijo* at 229 and *Central Motors* at 584. The Ohio Supreme Court has equated the "beyond a fair debate" standard with the "beyond a reasonable doubt" standard applied in criminal cases. The *Central Motors* Court stated on page 584 that:

> ***the party attacking the regulation must establish, beyond fair debate, that the zoning classification denies the owner an

Contrary to these decisions, this honorable Court has held that a two part **disjunctive** test be applied in analyzing a taking under the U. S. Constitution. In other words, the regulation violates the U. S. Constitution if it denies the property owner an economically viable use of the land **or** it does not substantially advance a legitament government interest. *Agins*, 447 U.S. at 260 and, *Lucas*, 505 U.S. at 1016.

As part of the disjunctive test this honorable Court has also provided additional protection for the property owner by requiring the trial court consider the landowner's "investment backed expectations" in deciding whether the regulated property has been deprived of its economic viability. *Id. at* 1034, *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S. Ct.

> economically viable use of the zoned property, and that the zoning classification fails to advance a legitimate governmental interest. *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St. 3d 223, 638 N.E. 2d 533, Syllabus. This Court has stated that **there is little difference between the "beyond fair debate" standard, and the "beyond a reasonable doubt" standard**. (emphasis added).

Ohio property owners must therefore prove their constitutional rights by a criminal standard. There is no indication in any federal case law that property owners must prove their constitutional rights regarding the disjunctive federal test by a criminal standard. Although *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S. Ct. 114, 118, 71 L. Ed. 303, 311, (1926) indicates that a "beyond a fair debate" test is used, this honorable Court has not likened this burden of proof to the high burden of proof used in criminal cases. Again, the Ohio Supreme Court has provided its property owners less constitutional protection than is afforded to them under the U.S. Constitution and this honorable Court's holdings concerning the same.

383, 390, 62 L. Ed. 2d 332 (1979), *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978). The *Gerijo* and *Central Motors* decisions fail to instruct trial courts in Ohio to considered the landowner's "investment backed expectations" in considering the economic viability prong of its test. Mr. Scheetz did not receive the benefit of this part of this Court's disjunctive federal test.

B. Application of the *Gerijo* and *Central Motors* holdings to the instant case offends, ignores, and undermines the basic principals of U.S. federal law preemption and U.S. Constitution supremacy thereby depriving Ohio property owners of their rights guaranteed by the U.S. Constitution.

The Takings Clause of the Fifth Amendment of the United States Constitution is applicable to the states through the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago* 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897). Additionally the Supremacy Clause of the U.S. Constitution Article VI Clause 2 states as follows:

> **This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary**

notwithstanding. (emphasis and underlining added).

The Ohio Supreme Court holdings in *Gerijo* and *Central Motors* and their application to the instant case offend the Supremacy Clause of the U.S. Constitution and well established holdings of this honorable Court concerning the supremacy of U. S. Federal law which were accurately noted by the Ohio Supreme Court itself in *Society National Bank v. Kienzle*, 11 Ohio App. 3d 178, 180-81, 463 N.E.2d 1261, 1264, (1983):

> **The Constitution, laws and treaties of the United States are as much a part of the law of every state as its own local laws and constitution.** Their obligations is "*** imperative upon the state judges in their official, and not merely in private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. **They were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States - - 'the supreme law of the land'"** *Martin v. Hunter's Lessee* (1816), 14 U.S. (1 Wheat) 304, at 340-341, 4 L. Ed. 833; *Testa v. Katt* (1947), 330 U.S. 386, 67 S. Ct. 810, 91 L.Ed. 967. **State courts have both the power and duty to enforce obligations arising under federal law, unless Congress gives the federal courts exclusive jurisdiction.** *Claflin v. Houseman*

> (1876), 93 U.S. 130, 23 L.Ed. 833; *Testa v. Katt* (1947), 330 U.S. 386, 67 S. Ct. 810 91 L.Ed. 967. **State courts are bound then to give effect to federal law when it is applicable, and to disregard state law when there is a conflict.** *Gibbons v. Ogden* (1824), 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23; *Hines v. Davidowitz* (1941), 312 U.S. 52, 61 S. Ct. 399, 85 L.Ed. 581. (emphasis and underlining added).

Preemption occurs when state regulation conflicts with or is incompatible with Federal law. *Fidelity Federal Savings & Loan Association v. DeLaCuesta*, 458 U. S. 141, 152-153, 102 S. Ct. 3014, 3022, (1982). Because *Lucas, Agins, Kaiser,* and *Penn Central* provide the property owner with more constitutional protection than is afforded by the Ohio Supreme Court's decisions in *Gerijo* and *Central Motors,* the U. S. Constitution and this honorable Court's decisions should preempt the conflicting lesser protections given by the Ohio Supreme Court. The Ohio Supreme Court, itself, in *Arnold v. City of Cleveland*, 67 Ohio St. 3d 35, 42, 616 N.E.2d 163, 169, (1993) stated:

> In the areas of individual rights and civil liberties, **the United States Constitution, where applicable to the state, provides a floor below which state court decisions may not fall.** (emphasis added).

The Ohio Supreme Court further stated in *Arnold*: "****** states may not deny individuals or groups the minimum of protection mandated by the Federal Constitution**". *Id.* at 42, 616 N.E.2d at 169.

(emphasis added). The Ohio Supreme Court's recent holdings in *Gerijo* and *Central Motors* conflict with relevant decisions of this honorable Court. These holdings therefore, violate the fundamental preemption rules and mandates of the Supremacy Clause that the U. S. Supreme Court and the Ohio Supreme Court itself, in *Arnold,* have articulated.

It should be noted by this honorable Court that Justices Pfeifer, Wright and A. William Sweeney of the Ohio Supreme Court joined a dissenting opinion in *Gerijo* arguing in favor of this honorable Court's disjunctive test. *Gerijo* at 231, 638 N.E.2d at 539.[8] In *Central Motors*, Justice Wright, concurring in judgment only, correctly explained why the federal disjunctive test should apply:

> "Although states may afford individuals greater rights than those afforded under the Federal Constitution, **states can not deprive individuals of rights that are guaranteed by the Federal Constitution. Because the majority's conjunctive test does not provide individuals with the full protection afforded by the Federal**

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[8]One leading Ohio commentator has recently suggested: **" The dissenters in *Gerijo* are clearly correct**. While the majority may be forgiven for not citing *Agins*, ***** its total disregard of *Lucas* is incomprehensible*****. *Gerijo* is a 4 to 3 decision, so perhaps the Court [the Ohio Supreme Court] will find an opportunity to change its opinion." Meek, Stuart, and Pearlman, Kenneth, *Ohio Planning and Zoning Law*, Banks-Baldwin Law Publishing Company, 1995-96 Edition, page 335. (emphasis added). The instant case gave the Ohio Supreme Court that opportunity, but instead, it denied certiorari. It is now clear that the only way this injustice can be remedied is through action of this honorable Court.

> **Constitution it is, itself, unconstitutional. When reviewing the constitutionality of the zoning ordinance this court should abandon the conjunctive test and follow the proper legal standards under the takings clause and or due process clause, as articulated by the United States Supreme Court.** *Central Motors* at 589, 590 (Justice Wright concurring in judgment only). (emphasis and underlining added)

The *Gerijo* and *Central Motors* cases have widespread and substantial constitutional ramifications since they conflict with this honorable Court's decisions and deprive Ohio property owners of their U.S. Constitutional rights.[9]

III. CONCLUSION

In the instance case the Medina County Common Pleas Court, the Medina County Appeals Court, and the Ohio State Supreme Court have applied and upheld a rule of law which conflicts with relevant decisions of this honorable Court. These lower courts did not misapply a properly stated rule of law, but instead applied an improper rule of law that conflicts with relevant decisions of this honorable Court. The Federal disjunctive test along with its

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[9] It is unclear why the Ohio State Supreme Court (after demonstrating a clear understanding and willingness to follow Federal law supremacy and preemption mandates in *Arnold*) has abandoned all notions of Federal law supremacy and preemption in its regulatory "takings" cases. Although the dissenters in *Gerijo* and *Central Motors* have correctly articulated Federal law supremacy and preemption concepts, the members of the majority have not explained themselves. Their opinions are silent as to the preemption and supremacy issues.

requirements to consider the landowner's "investment backed expectations" and its "fairly debatable" burden of proof test should have been, but were not, applied to Mr. Scheetz' claim for an unconstitutional "regulatory taking" without compensation. For the foregoing reasons each of these issues should be considered by this Court and *Certiorari* should be granted.

Respectfully Submitted,

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ATTORNEYS FOR
APPELLANT

cli.sche.app.mem-5

(2)

Supreme Court, U.S.
FILED

961650 APR 15 1997

OFFICE OF THE CLERK

CASE NO. _____

SUPREME COURT OF THE UNITED STATES
(October 1996 to October 1997 Term)

STANLEY D. SCHEETZ, TRUSTEE OF THE SEVILLE CORPORATE PARK SUBDIVISION TRUST U/A DATED DECEMBER 1, 1988

Appellant

v.

THE VILLAGE OF SEVILLE, OHIO

Appellee

ON PETITION FOR WRIT OF CERTIORARI TO THE MEDINA COUNTY APPEALS COURT, NINTH JUDICIAL DISTRICT OF OHIO

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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63 pp

APPENDIX INDEX

FINDINGS AND ORDER OF MEDINA COUNTY COMMON PLEAS COURT DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (February 17, 1995) .....EXHIBIT A

FINDINGS AND ORDER OF MEDINA COUNTY COMMON PLEAS COURT (September 11, 1995) .....EXHIBIT B

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IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

STANLEY D. SCHEETZ, TRUSTEE	)
	) CASE NO. 93CV1329
	) COMMON PLEAS
Plaintiff	) COURT 95 FEB 17
	) PM 3:22 FILED
v.	) KATHY FORTNEY
	)MEDINA COUNTY
	)CLERK OF COURTS
VILLAGE OF SEVILLE, OHIO	) FINDINGS AND
	) ORDER
	)
Defendant	)

***

1. Plaintiff has moved for Summary Judgment on its First Claim for Declaratory Judgment.

2. Defendant responded in opposition as well as moving for Summary Judgment in its favor on Plaintiff's Second Claim: Promissory Estoppel and on Plaintiff's "taking" claim.

3. Plaintiff responded in opposition to Defendant's Motion for Summary Judgment and replied to Defendant's response.

4. Defendant then replied to Plaintiff's response.

5. Plaintiff moved to strike Defendant's reply.

6. The Court, however, GRANTS Defendant leave to reply instant and DENIES Plaintiff's motion to strike.

7. The Court has been inundated with paper from both sides in this suit.

EXHIBIT A

8. The Court has thoroughly studied the file, case law, statutes and both the Ohio and United States Constitution.

9. Plaintiff is the owner of certain real property in the Village of Seville.

10. Mr. Scheetz, as the attorney for the prior owner of the property, petitioned and received approval from the Medina County Commissioners to annex the property to the Village of Seville.

11. On October 10, 1988, in Village of Seville Ordinance No. 22-88, the property was annexed to the Village.

12. At the time of the annexation, the property was zoned as Section 6 Commercial District of the then applicable Zoning Code.

13. On November 30, 1988, Stan Scheetz, Trustee, purchased the property.

14. On January 1, 1990, the Village of Seville adopted a new Zoning Ordinance, which changed the zoning of the annexed property to Highway Service Commercial.

15. The Highway Service classification severely limits permitted uses to gasoline stations, garage and automotive repair shops, restaurants and eating places, motels, signs, parking and loading, and all uses incidental to these uses. There are no allowed conditional uses.

16. As to Plaintiff's Motion for Summary Judgment dealing with the constitutionality issue, the Court finds there are genuine issues of material fact.

17. As to Defendant's Motion for Summary Judgment on Plaintiff's "taking" claim, the Court finds there are genuine issues of material fact.

18. As to Defendant's Motion for Summary Judgment on Plaintiff's promissory estoppel claim, the Court finds there is no genuine issue of material fact upon which reasonable minds could differ. Defendant is entitled to judgment as a matter of law.

19. The Court bases this finding on the reasoning in Westerville v. Kuehnert (1988), 50 Ohio App. 3d 77. Defendant has immunity for actions undertaken in the exercise of its governmental functions as here.

20. The Court GRANTS Defendant's Motion for Summary Judgment on Plaintiff's promissory estoppel claim.

21. Plaintiff has moved to bifurcate all non-jury issues from jury issues.

22. The Court finds favor with Plaintiff's motion. Trial to the Court shall be had on: **Wednesday, April 5, 1995, at 9:00 A.M.**, on all non-jury issues, i.e., declaratory judgment action.

23. The jury trial scheduled on OCTOBER 24, 1995, shall be held for the damages portion of this action.

IT IS SO ORDERED.

_____

PHILLIP A. BAIRD
Presiding Judge

A copy of the within Findings and Order has been mailed by the Court, this date, to Jeffrey T. Witschey, Esq., 3200 W. Market Street, Suite 300, Akron, Ohio 44333, to William B. Young, Esq., P.O. Box 220, Medina, Ohio 44258, and to Fred Vergon, Jr., Esq., 1965 E. Sixth Street, Suite 500, Cleveland, Ohio 44114.

IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

STANLEY D. SCHEETZ, TRUSTEE	) CASE NO. 93CV1329
Plaintiff	) COMMON PLEAS) COURT 1995,
v.	) SEPTEMBER 11,) AM 11:16 FILED
VILLAGE OF SEVILLE, OHIO	) KATHY FORTNEY,) MEDINA COUNTY) CLERK OF COURTS
Defendant	) FINDINGS AND) ORDER

***

1. This law suit was brought by Plaintiff when the Village of Seville rezoned a portion of Plaintiff's property to Highway Service Commercial, thus not allowing him to build apartments and condominiums as he had planned.

2. The area in dispute lies north of I-76 and west of State Route 3 at the northern edge of the Village of Seville.

3. Plaintiff purchased the property when it was a part of Guilford Township. At that time, it was zoned Commercial in the Township Zoning Code and apartments were not a permitted use.

4. Plaintiff successfully petitioned the Medina County Commissioners for annexation to the Village of Seville, and the Village, by Ordinance 22-88 adopted October 10, 1988, annexed the property to the Village.

EXHIBIT B

5. The Village amended its Zoning Ordinance on March 11, 1991, and changed Plaintiff's land to Highway Service Commercial which precluded any apartments or condominiums.

6. The rezoning to Highway Service Commercial basically follows the same as in other areas where an interstate highway or highways intersect with State highways and provide services such as fast food, chain restaurants, motels, service stations, automotive towing and repair shops, and accessory uses to the above.

7. Plaintiff had some initial success in attracting a Hardee's, a Dairy Queen, a Comfort Inn Motel (financed and built by Plaintiff and some partners), a Clearwater Systems, Subway Pizza, an Equipment Rental, a Graphic Arts Shop, and, by application, Lot 766 consisting of about six (6) acres was given a conditional use to construct condominiums.

8. Plaintiff attempted to get the balance of the property rezoned to Local Commercial. This was approved by the Village Planning Commission and the Trustees of the Board of Public Affairs.

9. The Application went to the Village Council, was voted on and denied by a 5 to 1 vote.

10. Plaintiff has made numerous attempts to attract other fast food chains and service stations, or other permitted uses, but has been unsuccessful to date.

    The reasons given were lack of a sufficient volume of traffic and location too far off of the interstate.

11. The excuse of too far off the Interstate does not seem valid since the distance at maximum would be 3000 feet, or approximately three-fifths (3/5) of a mile.

    There are many such eateries and service stations at a greater distance from the interchanges at other locations.

12. The Plaintiff's First Cause of Action is for a Declaratory Judgment declaring the Zoning Ordinance illegal, unconstitutional, and void in general.

13. Plaintiff's Second Cause of Action is for Promissory Estoppel.

The Court has already granted Summary Judgment to the Defendant on this Cause of Action.

14. As previously indicated, even if Plaintiff would have his way and have the zoning Local Commercial, he still would not be able to construct apartments or condominiums without a Conditional Zoning Certificate, Section 7.

15. The Court has reviewed all of the testimony, exhibits, briefs, and cited cases and considered the positions of both parties to this action.

16. The Village of Seville, like many other small communities, enacted a zoning code in order to promote orderly growth and maintain a balance of housing, industrial and commercial areas.

17. The Plaintiff is a developer and is interested in developing areas and supplying what he perceives to be a need for condominiums and apartments, the first for older citizens and the

latter for younger citizens who will later buy or build a house.

18. An action for declaratory judgment is essentially a special statutory proceeding, and the controversy required to support an action for a declaratory judgment must be a controversy based upon legal rights and obligations.

19. The Village has the right to enact a zoning code and to amend it as may become necessary.

20. The Plaintiff has the right to develop property so long as the developing does not violate the zoning code.

21. An amendment to a zoning code, such as here, to establish a Highway Service Commercial area, is reasonable and, in the Court's opinion, not illegal, arbitrary or unconstitutional.

ACCORDINGLY, the Court finds in favor of the Defendant Village of Seville and against the Plaintiff on his Complaint for a Declaratory Judgment.

Costs are assessed to Plaintiff.

IT IS SO ORDERED.

PHILLIP A. BAIRD
Presiding Judge

A copy of the within Findings and Order has been mailed by the Court, this date, to Jeffrey T. Witschey, Esq., 3200 W. Market Street, Suite 300, Akron, Ohio 44333, to William B. Young, Esq., P.O. Box 220, Medina, Ohio 44258, and to Fred Vergon, Jr., Esq., 1965 E. Sixth Street, Suite 500, Cleveland, Ohio 44114.

STATE OF OHIO	) IN THE COURT OF
	) OF APPEALS NINTH
COUNTY OF MEDINA	) JUDICIAL DISTRICT
	)
STANLEY D. SCHEETZ,	)
TRUSTEE	) C.A. NO. 2482-M
	)
Appellant	)
	)
v.	) APPEAL FROM
	) JUDGMENT
VILLAGE OF SEVILLE,	) ENTERED IN THE
	) COMMON PLEAS
Appellee	) COURT COUNTY OF
	) MEDINA, OHIO
	) CASE NO.
	) 93 CIV 1329

***

DECISION AND JOURNAL ENTRY

Dated: August 21, 1996

This cause was heard upon the record in the Trial Court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Judge.

Appellant, Stanley Scheetz, as Trustee of Seville Corporate Park Subdivision Trust, appeals from a declaratory judgment of the Medina County Court of Common Pleas that the Village of Seville Zoning Code, as amended, was constitutional. We affirm.

In late 1988, Scheetz, as owner of several parcels of real property in Guilford Township, had successfully petitioned the annexation of the property to the Village of Seville ("village"). Scheetz had apparently hoped that annexation to the village would facilitate

EXHIBIT C

his plan to build condominiums and multi-family apartments on the property. At no time before or after annexation, however, was the property ever zoned for multi-family apartments. The property as originally zoned, however, would allow multi-family housing as a conditional use.

In December of 1989, the village enacted a new comprehensive zoning ordinance, which was twice amended during the next two years. At some point,[1] due to its proximity to a highway intersection, the village changed the zoning of Scheetz's property from commercial to highway service commercial. Highway service commercial zoning does not allow for any conditional uses. Rather, the property may only be used for commercial services to highway travelers, such as gasoline service stations, motels, restaurants, automotive repair shops, signs, and parking lots.

Scheetz was able to sell or develop substantial portions of the property for uses permissible within the highway service commercial district. Scheetz unsuccessfully attempted to get a conditional use permit or rezoning for the remainder of the property. Scheetz consequently brought this declaratory judgment action against the village, attempting to have the zoning ordinance declared illegal, unconstitutional, and void. Through the same complaint, Scheetz also stated a claim for promissory estoppel. The promissory estoppel claim was later dismissed by summary judgment, and is not at issue in this appeal.

Following an evidentiary hearing, the trial court determined that the village's zoning ordinance was

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[1] Due to alleged procedural errors during the enactment of the zoning ordinance, the parties sharply dispute when the zoning change occurred.

not unconstitutional. Scheetz appeals and raises four assignments of error.

Assignment of Error I

The trial court failed to apply the federal 2-prong disjunctive test in determining whether the zoning ordinance effected an unconstitutional taking of the undeveloped lots.

Scheetz contends that, in evaluating the constitutionality of the zoning ordinance, the trial court applied the wrong law. It is well settled in Ohio that a party challenging the constitutionality of a zoning ordinance "most prove, beyond fair debate, both that the enactment deprives him or her of an economically viable use and that it fails to advance a legitimate governmental interest." *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, syllabus. Although Ohio courts had been applying essentially the same test, though worded differently, prior to the *Gerijo* decision, the *Gerijo* court was asked to resolve whether a challenger must prove both elements or only one. The *Gerijo* court stressed that, to invalidate a zoning ordinance, the challenging party must prove both elements of the two-step test, and reworded the test so as to reflect the conjunctive nature of the elements. *Id.* at 226-228.

Rather than following the Ohio Supreme Court's conjunctive test, requiring a challenger to prove both elements, Scheetz asks us to follow the federal disjunctive test, which would require him to prove only one element or the other. See *Agins v. Tiburon* (1980), 447 U.S. 255, 260, 65 L.Ed 2d 106, 112. This position, that Ohio courts should employ a disjunctive test, was taken by the concurring and dissenting opinions in *Cent. Motors Corp. v. Pepper*

Pike (1995), 73 Ohio St.3d 581, 588-590 (Wright, J., concurring in judgment only), 590 (Pfeifer, J., dissenting).

The majority opinion in *Central Motors*, however, reaffirmed that the appropriate test in Ohio is the conjunctive test set forth in the syllabus of *Gerijo*. *Id.* at 584. We are bound to follow the syllabus law of the Ohio Supreme Court and have no jurisdiction to reverse or modify it. *Love v. Motorists Mut. Ins. Co.* (1971), 31 Ohio App.2d 17, 21. Therefore, the trial court did not err in applying the *Gerijo* conjunctive test. The first assignment of error is overruled.

Assignments of Error

II. The trial court erred in failing to find that Mr. Scheetz proved at least one prong of the two prong test by the manifest weight of the evidence and that the defendant failed to rebut the same with credible, competent evidence in the form of basic physical facts relevant to the particular circumstances of the instant case.

III. The trial court erred in failing to find that the defendant arbitrarily excluded multi family apartment complexes in violation of the Ohio and United States Constitutions.

We will address the second and fourth assignments or error together, as they are interrelated. In the trial court, Scheetz alleged that the zoning ordinance was unconstitutional by restricting his property to highway service commercial uses and by refusing to allow multi-family apartment buildings. Scheetz contends that the trial court's failure to declare the zoning ordinance unconstitutional was against the manifest weight of the evidence.

Under *Gerijo*, as stated above, to invalidate the zoning ordinance on constitutional grounds, Scheetz was required to prove, beyond fair debate, that it (1) deprived him of an economically viable use of his property, and (2) that it failed to advance a legitimate governmental interest. *Gerijo, supra*, syllabus. We apply this test bearing in mind that there is a strong presumption that a zoning ordinance is valid as enacted. *Id.* at 226. "The party challenging an ordinance bears, at all stages of the proceedings, the burden of demonstrating that the provision is unconstitutional." *Id.*

Although still disputing the legal standard that should have been applied by the trial court, the parties are in agreement as to the appropriate standard of review. We will not reverse the trial court's judgment as against the weight of the evidence so long as it is supported by "some competent, credible evidence going to all the essential elements of the case[.]" *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.3d 279, syllabus,

Scheetz contends that he established that the Village's action deprived him of an economically viable use of his property. A zoning ordinance is considered to be impermissibly restrictive only when it denies an owner all uses of the property except those which are highly unlikely or practically impossible under the circumstances. *Cent. Motors, supra*, at 587.

The evidence before the trial court demonstrated that Scheetz had been able to sell substantial portions of the property. Although he had been unsuccessful in his attempts to sell the remaining portions of the property, it was unclear whether the market might improve over time. Moreover, Scheetz had not exhausted the full range of permissible

highway service commercial uses. Rather, he had concentrated his marketing efforts on large fast food and full service restaurant chains. Because he had apparently made no attempts to sell the property for use as an automotive repair shop or any of the other uses permitted in the highway service commercial district, he did not establish that he had been deprived of an economically viable use of his property.

Even if Scheetz had established that the Village's zoning ordinance deprived him of an economically viable use of his property, he failed to satisfy the second prong of the *Gerijo* test. Because Scheetz continues to argue that the trial court should have applied a disjunctive test, he focuses most of his argument on the first prong of the test, while essentially ignoring the second prong.

The second prong of the *Gerijo* test required Scheetz to prove, beyond fair debate, that the zoning ordinance failed to advance a legitimate governmental interest. *Gerijo, supra*, at syllabus. The Village's determination that its zoning action would serve certain governmental interests must be given great deference. Recognizing that "[t]he legislative, not the judicial, authority is charged with the duty of determining the wisdom of zoning regulations, ***the judicial judgment is not to be substituted for the legislative judgment in any case in which the issue or matter is fairly debatable." *Ketchel v. Bainbridge Twp.* (1990), 52 Ohio St.3d 239, 246.

The Village contended that by excluding multi-family apartments as a permissible use, it could preserve and protect the character of the community by maintaining an appropriate balance of residential, commercial, and industrial areas. Intermingling of

multi-family and commercial districts in the area would present a safety hazard, and present noise and traffic difficulties. Allowing development of multi-family apartments would create an imbalance in the existing ratio of single family to multi-family residences in the Village. The Village did not want a substantial increase in the rental, residential population because renters are not as committed to the community as homeowners who tend to have strong ties to the community.

"[A] municipality may properly exercise its zoning authority to preserve the character of designated areas in order to promote the overall quality of life within the city's boundaries." *Cent. Motors, supra*, at 585. Therefore, the Village's interest in preserving the existing ratio of homeowners to renters was a legitimate governmental interest. The Village also claimed that the rapid increase in population caused by multi-family apartments would lead to an increase in crime, traffic problems, and would overburden the community's services and utilities. The Village stated that its designation of this area as highway service commercial promoted its interest in servicing the needs of travelers from the nearby highway interchange.

Scheetz does not argue that these purported interests are not legitimate. Instead, he contends that the Village's zoning ordinance does not advance these interests. Scheetz focuses his argument on the weakness of the Village's evidence that these particular interests would be advanced by the zoning ordinance. The Village, however, had no burden to prove that these interests would, in fact, be advanced by the zoning ordinance. Moreover, the trial court's focus was not solely on whether the ordinance would advance these particular interests, or how effective it would be in so doing. Rather,

Scheetz had the burden to prove that neither the purported interests nor any other legitimate governmental interests would be advanced by the Village's zoning ordinance. See *Cent. Motors, supra*, at 586-587. Scheetz presented no such evidence. Therefore, he failed to establish that the Village's zoning ordinance did not advance a legitimate governmental interest.

Scheetz failed to establish, beyond fair debate, that the Village's zoning ordinance deprived him of an economically viable use of his property and that it failed to advance a legitimate governmental interest. Because there was competent, credible evidence to support the trial court's determination that the Village's zoning ordinance was not unconstitutional, the second and fourth assignments of error are overruled.

Assignment of Error III

The trial court erred in failing to find that the defendant violated Mr. Scheetz's statutory and due process rights.

Scheetz alleges that numerous procedural errors were made by the Village in its enactment of the zoning ordinance in December 1989 and in later actions related to the zoning designation of his property as highway service commercial. Due to these errors, he contends, the ordinance is unconstitutional. Scheetz argues on appeal that the trial court erred in failing to find the zoning ordinance unconstitutional on these procedural grounds.

We find no error by the trial court, however, because this issue was not properly before it. The issues to be determined in a declaratory judgment

action are "as broad or as narrow as the plaintiff desires. These issues are derived from the allegations of the complaint, the prayer for relief, and the evidence presented." *Cent. Motors Corp. v. Pepper Pike* (1979), 63 Ohio App.2d 34, 56. Scheetz failed to assert any of these procedural arguments in his complaint for declaratory judgment. Because Scheetz framed the issues before the trial court, and failed to include this procedural argument, the trial court did not err in failing to do something that it was not asked to do.

Moreover, as the Village correctly asserts, such an action would have been barred by the statute of limitations. R.C. 713.121 provides:

> No action challenging the validity of a zoning ordinance or regulation or of any amendment to such an ordinance or regulation because of a procedural error in the adoption of the ordinance, regulation, or amendment shall be brought more than two years after the adoption of the ordinance, regulation, or amendment.

Scheetz's complaint was filed on November 29, 1993, more than two years after the enactment of the zoning ordinance in December 1989. In his reply brief, Scheetz attempts to bring his procedural challenge within the two-year period by focusing on related actions taken by the Village in 1992 or 1994. At the heart of his argument in his main brief, however, are the actions or omissions of the Village at the time it enacted the ordinance. Therefore, any such action based on these procedural errors was barred by the statute of limitations. The third assignment of error is overruled.

The judgment of the trial court is affirmed.

Judgment Affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Medina Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be filed stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

S/
LYNN C. SLABY
FOR THE COURT

REECE, P.J.
CONCURS

DICKINSON, J.
CONCURS SAYING:

I concur in the judgment of the majority, although for slightly different reasons. This case has been difficult to analyze because of the shotgun approach taken by the appellant before the trial court and before this court. At bottom, however, as I

understand the issues, the decision of the trial court is properly affirmed.

It is unnecessary to resolve appellant's first assignment of error because, regardless of whether the appropriate test is disjunctive or conjunctive, appellant has failed to convince me that the trial court's decision was against the manifest weight of the evidence. He failed to prove, as argued in his second assignment of error, that it is not economically feasible for him to use his property for any of the uses now permissible on it or that the present zoning does not further a legitimate state interest.

Certain parcels of appellant's land have been developed. Although he has contended that that development only took place with incentives that made the development unprofitable, he failed to present sufficient evidence to support such a finding. His evidence included references to dollar amounts, but lacked the specificity that would permit a finding regarding economic viability. Further, although, with the last zoning change to appellant's property, that property may now be used for service related commercial development beyond that permissible in a highway service district, appellant's attempt to prove that such uses are not practical was nominal at best. He did not, therefore, carry his burden on the first prong of the two pronged test.

The current zoning furthers the village's legitimate interest in keeping commercial development separate from residential uses, thereby maximizing property values for all the village's residents. The village presented evidence that tended to prove that appellant's property was unsuitable for residential development. Among such evidence was the mayor's testimony that access between appellant's

property and the center of the village was limited to a bridge over an interstate highway that does not include a walkway for pedestrian traffic and that the village lacks public transportation. Appellant did not carry his burden on the second prong of the two pronged test.

Appellant failed to properly raise the argument encompassed by his third assignment of error before the trial court and, therefore, it is not properly before this Court. Assuming appellant had standing to raise the argument encompassed by his fourth assignment of error and, further, that arbitrarily excluding apartment complexes from the village would be violative of the Ohio and United States Constitutions, appellant did not prove his claim that the village did arbitrarily exclude apartment complexes. Among other things, he failed to prove that sufficient rental properties do not already exist within the village.

The decision of the trial court was not against the manifest weight of the evidence. Accordingly, that decision is properly affirmed.

APPEARANCES:

JEFFREY T. WITSCHEY, NICHOLAS GEORGE, and FRANK WITSCHEY, Attorneys at Law, 33200 W. Market St., Suite 300, Akron, OH 44333 for Appellant.

FREDERICK VERGON, JR., Attorney at Law, 500 Nat'l. City Tower, 1965 E. Sixth St., Cleveland, OH 44114 for Appellee.

WILLIAM B. YOUNG, Attorney at Law, 230 S. Court S t., P.O. Box 220, Medina, OH 44258 for Appellee.

THE SUPREME COURT OF OHIO

FILED
JAN 15 1997
MARCIA J. MENGEL,
CLERK SUPREME
COURT OF OHIO

Stanley D. Scheetz, Trustee	) 1997 Term
Appellant,	) Case No. 96-2241
	)
v.	) ENTRY FILED
	) JANUARY 15, 1997
Village of Seville,	) MARCIA J.
Appellee,	) MERRGEL, CLERK
	) SUPREME COURT
	) OF OHIO

***

Upon consideration of the jurisdiction memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Witschey & Witschey Co., L.P.A.

(Medina County Court of Appeals; No. 2428M)

S/
Thomas J. Moyer
Chief Justice

cli.scheetz.appeal.exhibitd.

EXHIBIT D

separate and independent argument.

We have also touched upon some issues where we can clearly see due process violations in this case, and also that Mr. Schee3tz had his vested rights and property taken because of Seville not accepting Mr. Scheetz' non-conforming vested rights.

With respect to all of these issues, we believe we have presented the facts necessary for you to make rulings in our favor on all of these counts.

Now, we would like to review some of those facts, and apply the law to those facts, to make the concepts clear, and make our entitlement to judgment clear.

First of all, with respect to the unconstitutional takings aspect of this case, we see that there is a two prong test that is both in Ohio and in the federal law, but there is a difference.

In Ohio law, it is a conjunctive test, you have to prove both there has been a denial of the economic viability of the property because of the zoning ordinance, and you have to prove that the zoning ordinance, or the land being zoned the way it is zoned does not advance a legitimate government interest.

In Ohio, it is conjunctive.

In the federal test, you only have to prove one or the other.

EXHIBIT E

reservation to themselves of what they can do, and it is this type of statutory scheme that just provides a fertile ground for the types of legislative improprieties we have seen where they think we can do whatever they want, without reason.

One last comment the, Your Honor, on the economic viability aspect of this case.

In their trial brief, they mention that federal law requires a two prong test that is in the conjunctive, and cite two cases fort that proposition.

Your Honor, I would invite you to read those cases because you are going to find that that is not at all a proposition of law, that clearly both of those cases stand for the proposition that under the federal law it is a disjunctive test, that you only have to prove one of the two prongs.

Our evidence with respect to the economic viability of this land is completely unrefuted.

Mr. Sale couldn't do it because he is not qualified to render an opinion on the economic viability of the land.

Instead, they have just chosen to misstate the law so they don't have to hire another expert that is qualified to render an opinion on the economic viability of the land.

It is easier for them to argue the law is in the conjunctive, you have to prove both of the tests, and you

don't meet the test with respect to the advancement of a legitimate government interest.

Your Honor, the evidence has shown quite clearly that their zoning of this property throughout the entire extent of this land does not advance a legitimate government interest.

The law requires, on this issue of advancement of a legitimate government interest, that the ordinance must bear a real and substantial relation to the public health, safety, morals or general welfare.

It has to be real, and it has to be substantial.

Again, they can talk about all the buzz words in the world, traffic problems, capacity problems, they can talk about all of that, and we have evidence today that all they an do is talk about buzz words and theories, but the actual fact of the matter is that they met all of those tests, that we have capacity, that there is no evidence that there will be any traffic problems.

Also, their own expert witness, Mr. Dale, made a very clear admission today, that he is not even qualified to render an opinion on whether zoning the entire ext5ent of this property advances a legitimate government interest.

I asked Mr. Dale, while he was on the stand, if this property, if highway service users, the businesses and entities that provide highway service uses, if they are

I. ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT FAILED TO APPLY THE FEDERAL 2-PRONG DISJUNCTIVE TEST IN DETERMINING WHETHER THE ZONING ORDINANCE EFFECTED AN UNCONSTITUTIONAL TAKING OF THE UNDEVELOPED LOTS.

Ohio Courts have applied a conjunctive two part analysis to decide the constitutional validity of a zoning Ordinance. This two pronged analysis requires the land owner to show that the zoning classification denies the property of its economic viability **and** it does so without advancing a legitimate government interests. Gerijo, Inc. v. Fairfield (1994), 70 Ohio St. 3d 223. However, the United States Supreme Court has held that this two part test is in the **disjunctive** when applying the U.S. Constitution. In other words, the zoning classification is unconstitutional if it denies the property owner an economically viable use of the land or it does not substantially advance a legitimate governmental interest. See e.g. Agins v. Tiburon (1980), 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106, Lucas v. South Carolina coastal Council, (1992), 112 S. Ct. 2886, 2894. Since it provides the property owner more constitutional protection than is afforded under the Ohio Constitution, the United States Constitution preempts the lesser protection given under the Ohio Constitution.

In the areas of individual rights and civil liberties, **the United States**

> **Constitution, where applicable to the states, provides a floor below which state court decisions may not fall.** Arnold v. City of Cleveland (1993), 67 Ohio St. 3d 35, paragraph 1 of syllabus. (emphasis added)
>
> A common thread found in the state court decisions which have relied exclusively on the state's constitution is that **states may not deny individuals or groups the minimum of protections mandated by the Federal Constitution**. Id. at 42. (emphasis added).

Under the Supremacy Clause, U.S. Const. Art. VI, Cl.2, when state law conflicts or is incompatible with federal law, the state law is preempted by federal law. Preemption occurs when state regulation actually conflicts or is incompatible with Federal law. Fidelity Federal Sav. & Loan Ass'n v. DeLa Cuesta (1982), 458 U.S. 141, 152-153, 102 S. Ct. 3014, 3022. The Ohio Supreme Court's recent pronouncements in the Gerijo case and in Central Motors Corporation v. City of Pepperpike (1995), 73 Ohio St. 3d 581, ignore the basic preemption rules that the United States Supreme Court and the Ohio Supreme Court itself have articulated. Justices Wright, Pfeifer and A. William Sweeney joined a dissenting opinion in Gerijo arguing in favor of the disjunctive test. Gerijo at 231. In

Central Motor. Justice Wright explained why the federal disjunctive test should apply.

> Although states may afford individuals greater rights than those afforded under the federal constitution, **states cannot deprive individuals of rights that are guaranteed by the Federal Constitution.** Because the majority's conjunctive test does not provide individuals with the full protections afforded by the Federal Constitution, it is, itself unconstitutional. When reviewing the constitutionality of the zoning ordinance, this court should abandon the conjunctive test and follow the proper legal standards under the Taking Clause and/or Due Process Clause, as articulated by the United States Supreme Court. Central Motors Corp. at 589, 590 (Justice Wright concurring in judgment only). (emphasis added).

The trial Court Judge, although in his Findings somewhat unclear, applied the conjunctive test since he stated in paragraph 19 of his Findings: "The Village has the right to enact a zoning code and to amend it as may become necessary." Yet, the Trial Court Judge was silent as to compensation for the land owner if the "necessary" change deprived the land of its economic viability. The Trial Court erred in

applying the conjunctive test to the facts of the instant case since rules of federal law preemption require the application of the federal disjunctive test.

cli.scheetz.appeal.exhibitf.

by case basis. Additionally, the Defendant's Mayor, Jean Jamison, signed and entered on public record a version of the ordinance that she and William Young had prepared prior to the vote on the November ordinance. This version was not reflective of council's vote since council voted to allow all commercial uses as conditionally permitted uses. Tr. 222-228. Plaintiff's Exhibit 22, Plaintiff's Exhibit 35.

III. ASSIGNMENT OF ERROR NO. 1(pg. 3 Defendant's Brief):

> Lucas v. South Carolina Coastal Council (1992), 112 5 Ct. 2886, and the Fifth Amendment to the U.,S. Constitution don't apply to Mr. Scheetz' case because they only provide for a remedy in cases where there is a "complete takings".

The position is void of merit because:

1. The outcome of the court's determination under the Federal standard is not the issue on this appeal. This appeal only concerns whether the Federal disjunctive test should have been used to determine the outcome; 2. Lucas and the instant case are in no way distinguishable since both concern a regulatory taking that left the owner's land economically idle; 3. In neither Central Motors nor Gerijo do the majority opinions address the obvious conflict between Ohio's conjunctive test and the Federal disjunctive test; 4. In determining whether a "complete taking" of property has occurred, the Federal decisions require the court to consider the property owners "investment backed expectations". Lucas at 2903, see e.g., Kaiser Aetna v. United States (1979), 444 U.S. 164, 175. This factor clearly weighs in Mr. Scheetz' favor yet the trial court failed to consider it

and; 5. Lucas **and the Fifth Amendment to the U.S. Constitution apply to all takings cases!** Mr. Scheetz has asserted the same in his case throughout its pleading, discovery and trial stages.

IV. ASSIGNMENT OF ERROR NO.1 (pg. 6 Defendant's Brief)

> The trial court, therefore, did not err in failing to apply Lucas (citation omitted) and its disjunctive 2-prong test, since this was not a taking case under the Fifth Amendment of the United States constitution and since this was not a 'complete taking' case."

This statement is ludicrous. Throughout the entire case, Mr. Scheetz argued that the HSCD zoning of his property destroyed the economic viability of his property and/or the HSCD zoning failed to substantially advance a legitimate governmental interest and therefore violated his U.S. Constitutional rights.

V. ASSIGNMENT OF ERROR NO. 1 (pg. 6 Defendant's Brief):

> A City's refusal to enlarge an owner's rights in his property does not qualify as a taking of private property without justification.*** When a developer purchases property and then gambles on being able to secure a zoning modification, the developer cannot

> later complain when the government declines to modify the zoning.

This is a gross misinterpretation of Mr. Scheetz' claims which were clearly set forth in his Complaint and throughout the trial of this matter. With respect to the unconstitutional taking aspect of this case, Mr. Scheetz did not request the trial court to grant him a zoning modification or an enlargement of property rights beyond those property rights that he had when he purchased his property.[2] With respect to the unconstitutional taking of Mr. Scheetz' property, Mr. Scheetz has requested

[2] Mr. Scheetz has requested that he be allowed to develop a portion of his property for multifamily apartment complexes. However, his claim for this relief is founded upon the Defendant's unconstitutional exclusion of multifamily housing in Seville not its unconstitutional taking of Mr. Scheetz' property.

MEMORANDUM IN SUPPORT OF JURISDICTION IN THE SUPREME COURT OF OHIO

STANLEY D. SCHEETZ, TRUSTEE OF THE SEVILLE CORPORATE PARK SUBDIVISION TRUST U/A DATED DECEMER 1, 1988	**) C.A. NO. 2482-M) 96-2241)))) ON APPEAL FROM) THE MEDINA) COUNTY COURT**
Appellant	**) OF APPEALS) NINTH**
v.	**) APPELLATE) DISTRICT**
THE VILLAGE OF SEVILLE, OHIO	**)) COURT OF) APPEALS**
Appellee	**) CASE NO. 2482-M**

***

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, STANLEY D. SCHEETZ, TRUSTEE

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EXHIBIT H

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STATEMENT OF FACTS AND STATEMENT OF CASE

Stanley Scheetz, Trustee of the Seville Corporate Park Subdivision Trust (Mr. Scheetz) is the owner of certain undeveloped land (Undeveloped Land) in the Village of Seville, Ohio (Defendant). The Undeveloped Land was zoned commercial according to the Defendant's then applicable zoning code.[1] Mr. Scheetz, relying on the broad range of uses allowed by the commercial zoning of the Undeveloped Land purchased the Undeveloped Land on December 1, 1988 for $275,000. Mr. Scheetz then platted the Undeveloped Land and immediately began marketing the property for sale and investing money in infrastructure improvements such as streets, waterlines and sewers capable of handling a broad range of commercial uses.[2]

On January 1, 1990, Seville enacted a new zoning ordinance (Zoning Ordinance). Just prior to its enactment, a village council member added language for a new zoning district into the Zoning Ordinance entitled "Highway Service Commercial District" (HSCD).[3] However, no change or amendment was made to the zoning district map (Zoning District Map) which designated the land to be included in each of the various zoning districts. Mr. Scheetz' Undeveloped Land

---

[1] This district broadly allowed all commercial uses.

[2] As of trial, Mr. Scheetz had invested approximately $648,000 in infrastructure improvements and interest. To complete the road improvements, Mr. Scheetz' engineers estimated another $350,000.

[3] The language of the HSCD section strictly limited the use of potential HSCD land to the following permitted uses: (a) gasoline filling stations; (b) garage and automotive repair shops (c) restaurants and eating places; (d) motels; (e) signs; (f) parking and loading; and (g) accessory uses clearly incidental to the above uses. These uses will be referred to herein as "Highway Service Uses".

remained commercial. In 1992 the Zoning District Map was physically changed at the insistence of one village council member to change the zoning of the Undeveloped Land from commercial to HSCD. This change occurred without notice, without public discussion or debate and without official action or vote by the village planning commission or village council.

Except for a lot sold to Hardees Restaurants on the corner of S.R. 3 and Park Avenue West (Lot No. 763), Mr. Scheetz has been unable to sell any of the remaining Undeveloped Land in an arm's length transaction for any Highway Services Uses and has not been able to use the remainder of the Undeveloped Property for any economically viable use. In 1992, Mr. Scheetz having found a great demand for multifamily apartment housing sought approvals of various amendments to the Zoning District Map allowing him to construct multifamily dwellings on a portion of the Undeveloped Land. None of Mr. Scheetz' requests for amendments were allowed because Seville had instituted a policy preventing the construction of more new apartment housing in Seville.

On November 29, 1993, Mr. Scheetz filed his Complaint for Declaratory Judgment and Money Damages for the unconstitutional regulatory taking of his property. On September 6, 1994, Mr. Scheetz filed his Amended Complaint requesting the Trial Court issue its Declartory Judgment that the Zoning Ordinance is unconstitutional and unlawful in general and as it is applied to the Undeveloped Land. The Trial Court conducted a bench trial held on June 6 through June 9 and July 5, 1995. The pleaded declaratory judgment claims and a procedural due process issue concerning the unadopted zoning district map were tried. On September 12, 1995, the Trial Court filed its findings and final judgment entry in favor of the Defendant on the pleaded declaratory judgment aspects of the case and failed to rule on the procedural due process issue which was tried in Court. On September 21, 1995

Mr. Scheetz filed his appeal with the Medina County Appeals Court. On August 21, 1996 the Appeals court denied Mr. Scheetz' appeal.

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This appeal presents substantial constitutional issues and matters of public and great general interest in four critical areas regarding the current and future property rights of Ohio land owners:

A. Whether Ohio land owners are protected by the U. S. Constitution and the U. S. Supreme Court decisions regarding Fifth Amendment "takings cases";

B. Whether Ohio Civ. Rule 15 (B) applies to declaratory judgment actions regarding procedural due process cases under the Ohio and U.S. Constitution; and

C. The proper application of the Ohio statute of limitations (Ohio Code Section 713.121) regarding procedural due process violations in the rezoning of a private property; and

D. Whether a municipality's arbitrary exclusion of multifamily apartment complexes is a violation of the U. S. and Ohio Constitutions.

An explanation of why these issues are of public and great general interest and involve substantial constitutional questions follows with applicable propositions of law:

A. WHETHER OHIO LAND OWNERS ARE PROTECTED BY THE U. S. CONSTITUTION AND THE U. S. SUPREME COURT DECISIONS REGARDING FIFTH AMENDMENT "TAKINGS CASES".

The Appeals Court in the instant case applied this Court's holdings in *Gerijo, Inc. v. City of Fairfield* (1994), 70 Ohio St. 3d 223 and *Central Motors Corporation v. City of Pepper Pike* (1995), 73 Ohio St. 3d 581. These cases are of great public and general interest to all Ohio real property owners and involve substantial constitutional questions.

In this case the appellant, Stanley Scheetz, Trustee (Mr. Scheetz) alleged in his complaint and argued throughout the course of the trial that the actions of the Village of Seville, Ohio (the Appellee) constituted an unconstitutional taking of Mr. Scheetz' property under the Ohio **and** the U.S. Constitutions. There is a substantial difference in the constitutional protection afforded under each of these constitutions. The U.S. Supreme Court in interpreting and applying the U.S. Constitution has offered substantially more protection to the property owner regarding "takings cases" than this Court has afforded property owners under the Ohio Constitution in its *Gerijo* and *Central Motors* cases. This has caused severe and wide-spread ramifications for Ohio property owners who have had or may in the future have interests in their property infringed upon, by Ohio state or municipal regulations. Because of *Gerijo* and *Central Motors* such Ohio real property owners are not afforded the benefits of their U.S. Constitutional rights as pronounced in cases such as *Lucas v. South Carolina Coastal Council* (1992), 112 S.Ct. 2886 and *Agins v. Tiburon* (1980), 447 U. S. 255, 100 S. Ct. 2138, 65 L.Ed. 2d 106. This denial of rights is of great general and public interest and involves substantial constitutional questions since:

1. Proposition Of Law No. 1: *Gerijo* and *Central Motors* offend, ignore, and undermine the basic principals of U.S. federal law preemption and U.S. Constitution supremacy thereby depriving Ohio property owners of their rights guaranteed by the U.S. Constitution.

In *Gerijo* and *Central Motors* this Court applied a **conjunctive** two part analysis to decide the constitutional validity of zoning regulations in Ohio. This two prong analysis requires the landowner alleging the "taking" to show that the zoning classification denies his or her property of its economic viability **and** does so without advancing legitament government interests. *Gerijo*, at 228 and *Central Motors* at 584. Contrary to these decisions, the U. S. Supreme Court has held that a two part **disjunctive** test be applied in analyzing a taking under the U. S. Constitution. In other words, the regulation violates the U. S. Constitution if it denies the property owner an economically viable use of the land **or** it does not substantially advance a legitament government interest. *Agins*, 447 U.S. at 260 and, *Lucas* 112 S. Ct. at 2894. In addition to a disjunctive test the U.S. Supreme Court has also provided additional protection for the property owner by requiring the trial court consider the landowner's "investment backed expectations" in deciding whether the regulated property has been deprived of its economic viability. *Lucas* at 2903 and *Kaiser Aetna v. United States* (1979), 444 U.S. 164, 175. The *Gerijo* and *Central Motors* decisions fail to instruct trial courts in Ohio to considered the landowner's "investment backed expectations".

The Supremacy Clause of the U.S. Constitution Article VII Clause 2 states as follows:

> **This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.** (emphasis and underlining added).

This Courts holdings in *Gerijo* and *Central Motors* offend the Supremacy Clause of the U.S. Constitution and well established U.S. Supreme Court holdings concerning the supremacy of U. S. Federal law which were accurately noted in *Society National Bank v. Kienzle* (1983), 11 Ohio App. 3d 178, 180-81:

> **The Constitution, laws and treaties of the United States are as much a part of the law of every state as its own local laws and constitution.** Their obligations is "*** imperative upon the state judges in their official, and not merely in private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. **They were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States -- 'the supreme law of the land'"** *Martin v. Hunter's Lessee* (1816), 14 U.S. (1 Wheat) 304, at 340-341, 4 L. Ed. 833; *Testa v. Katt* (1947), 330 U.S. 386, 67 S. Ct. 810, 91 L.Ed. 967. **State courts have both the power and duty to enforce obligations arising**

> **under federal law, unless Congress gives the federal courts exclusive jurisdiction.** *Claflin v. Houseman* (1876), 93 U.S. 130, 23 L.Ed. 833; *Testa v. Katt* (1947), 330 U.S. 386, 67 S. Ct. 810 91 L.Ed. 967. **State courts are bound then to give effect to federal law when it is applicable, and to disregard state law when there is a conflict.** *Gibbons v. Ogden* (1824), 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23; *Hines v. Davidowitz* (1941), 312 U.S. 52, 61 S. Ct. 399, 85 L.Ed. 581. (emphasis and underlining added).

Preemption occurs when state regulation conflicts with or is incompatible with Federal law. *Fidelity Federal Savings & Loan Association v. DeLaCuesta* (1982), 458 U. S. 141, 152-153, 102 S. Ct. 3014, 3022. Since the U. S. Supreme Court cases, interpreting the U. S. Constitution, provide the property owner with more constitutional protection than is afforded by this Court's decisions in *Gerijo* and *Central Motors*, the U. S. Constitution and U. S. Supreme Court decisions should preempt the conflicting lesser protections given by this Court. *Arnold v. City of Cleveland* (1993), 67 Ohio St. 3d 35. The *syllabus* in the *Arnold* case stated:

> In the areas of individual rights and civil liberties, **the United States Constitution, where applicable to the state, provides a floor below which state court decisions may not fall.** (emphasis added).

This Court further stated in *Arnold*: "*** **states may not deny individuals or groups the minimum of protection mandated by the Federal Constitution**". *Id. at 42.*(emphasis added).

This Court's recent pronouncements in *Gerijo* and *Central Motors* ignore the fundamental preemption rules and mandates of the Supremacy Clause that the U. S. Supreme Court and this Court itself have articulated. However, Justices Pfeifer, Wright and A. William Sweeney joined a dissenting opinion in *Gerijo* arguing in favor of the U.S. Federal disjunctive test. *Gerijo* at 231. In *Central Motors*, Justice Wright correctly explained why the disjunctive test should apply:

> "Although states may afford individuals greater rights than those afforded under the Federal Constitution, **states can not deprive individuals of rights that are guaranteed by the Federal Constitution. Because the majority's conjunctive test does not provide individuals with the full protection afforded by the Federal Constitution it is, itself, unconstitutional. When reviewing the constitutionality of the zoning ordinance this court should abandon the conjunctive test and follow the proper legal standards under the takings clause and or due process clause, as articulated by the United States Supreme Court.** *Central Motors Corp.* at 589, 590 (Justice Wright concurring in judgment only). (emphasis added).[4]

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[4] One leading commentator has recently suggested: " **The dissenters in *Gerijo* are clearly correct**. While the majority may be forgiven for not citing *Agins*, since the U.S. Supreme Court has not always been noted for the clarity of its takings opinions, **its total disregard of *Lucas* is incomprehensible*****Gerijo* is a 4 to 3 decision, so perhaps the Court will find an opportunity to change its opinion." Meek, Stuart, and Pearlman, Kenneth, *Ohio Planning and Zoning Law*,

The *Gerijo* and *Central Motors* cases have widespread and substantial constitutional ramifications since they deprive Ohio property owners of their U.S. Constitutional rights.

2. <u>Proposition of Law No. 2</u>: The *Gerijo* and *Central Motors* decisions place Ohio trial and appellate courts in the "catch 22 position" of violating the supremacy clause of the U.S. Constitution, the *Lucas* and *Agins* decisions, and this court's holding in *Arnold V. City Of Cleveland* (1993), 67 Ohio St. 3d 35 (the U.S. Constitution provides a floor of protection below which state law can not fall) or violating *Gerijo*, *Central Motors*, and this Court's holding in *Smith V. Kelm* (1983), 6 Ohio St. 3d 16 (Ohio appellate courts are bound to follow Ohio Supreme Court syllabus law).

The *Gerijo* and *Central Motors* decisions place our Ohio trial and appellate courts in an untenable "catch 22 position". For instance, in this case, the Appeals Court cited *Thaker v. Board of Trustees of the Ohio State University* (1971), 31 Ohio App. 2d 17 and *Love v. Motors Mutual Insurance Co.*, (1993), 86 Ohio App. 3d 394 for the proposition of law set forth by this Court in *Smith v. Kelm* (1983), 6 Ohio St. 3d 16 that: "The syllabus of an opinion issued by the Supreme Court of Ohio states the law of the case, and therefore, all lower courts in this state are bound to the principals which it sets-forth". *Thacker* at 400. Given this requirement an Ohio trial appellate court would be in a significant quandary in determining

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Banks-Baldwin Law publishing company, 1995-96 Edition, page 335. (emphasis added).

which law to apply. If a lower court in Ohio applies the *Lucas* and *Agins* disjunctive test and considers the land owners "investment backed expectations" its holding would be consistent with the U. S. Supremacy Clause and this Court's pronouncement in *Arnold*, but would be at the same time inconsistent with this Court's rulings in *Gerijo* and *Central Motors*, therefore violating its duty to follow Ohio Supreme Court law as pronounced in *Kelm*. On the other hand, if an Ohio trial or appellate court applied the conjunctive test set forth in *Gerijo* and *Central Motors* and did not consider the owners "investment backed expectations", its holding would be consistent with this Court's pronouncement in *Kelm*, but would at the same time violate the U. S. Supreme Court pronouncements in *Lucas* and *Agins* therefore violating the U. S. Supremacy Clause and this Courts holding in *Arnold*. This situation alone requires this Court's reevaluation of its *Gerijo* and *Central Motors* decisions since they leave Ohio's lower courts without proper direction.

3. **<u>Proposition of Law No. 3</u>: The *Gerijo* and *Central Motors* cases invite the governmental confiscation of private property without compensation and invite the maintenance of wasteful ordinances that fail to advance government interests.**

The application of the conjunctive test set forth in *Gerijo* and *Central Motors* invites the regulatory confiscation of private property in Ohio without compensation to the land owner. Querry: If a private property owner is called upon to give up use of his or her land for the public good shouldn't he or she be compensated by the government so that all of those in the public who benefit by the confiscation pays for it (i.e. through taxes etc.). Additionally, the *Gerijo* and *Central Motors* cases invite the maintenance of wasteful

ordinances that don't advance legitament government purposes. For instance, an Ohio property owner under the *Gerijo* and *Central Motors* decisions could have the use of his or her property impaired, but not quite to the point of a complete economic loss by a useless ordinance that doesn't advance any legitament government purposes. Querry: Why should a property owner lose any value in his property at all in favor of an ordinance that does nothing to advance a government interest?

B. WHETHER OHIO CIV. R. 15 (B) APPLIES TO DECLARATORY JUDGMENT ACTIONS REGARDING PROCEDURAL DUE PROCESS CASES UNDER THE OHIO AND U.S. CONSTITUTIONS.

The Appeal Court below held that it was not error for the Trial Court to fail to rule on Mr. Scheetz' claim for violations of his procedural due process rights since he failed to allege this issue in his complaint for declaratory judgment. This holding is of great general interest and involves a substantial constitutional question since it assumes that Ohio Civ. R. 15 (B) does not apply to declaratory judgment actions regarding due process violations. The instant Appeals Court cites *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App. 2d 34 for the basis of this decision. However, the *Central Motors* case in no way trumps a parties rights under Ohio Civ. R. 15 (B). This issue takes on substantial constitutional significance and great public interest since most suits concerning the constitutionality of a government ordinance or action are brought as declaratory judgment actions.

4. **<u>Proposition of Law No. 4</u>: Ohio Civ. R. 15 (B) is applied to declaratory judgment actions regarding procedural due process violations the same as with any other cause of action.**

Ohio Civ. R. 15 (B) provides in pertinent part:

> **When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they have been raised in the pleadings.** Such amendment of the pleadings as may be necessary to cause them to confirm to the evidence and raise these issue may be made upon motion of any party at any time, even after judgment. **Failure to amend as provided herein does not affect the result of the trial of these issues**. (emphasis added).

This court has stated: "**It is axiomatic that cases are to be decided on the issues actually litigated at trial.**" *Evens v. Bainbridge Township Trustees* (1983) 5 Ohio St. 3d 41, 44 (emphasis and underlining added). See also, *Hall v. Bunn* (1984), Ohio St. 3d 118, 121. "Rule 15 was promulgated to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties [citations omitted]" *Hall* at 121. The *Evens* Court further stated that Ohio Civ. R. 15 (B) "*** allows for **liberal** amendment of the pleadings toward that end ***". *Evens* at 44. (emphasis added). The Commentary/Staff notes to Civ. R. 15 (B) note No. 2 states:

> "**If the opposing party does not raise an objection to the introduction of evidence outside of the pleadings and continues on the merits, the evidence is treated as if it had been raised by the pleadings whether the pleadings are amended to include such evidence or not.** *** If no objections were raised, he would be permitted to continue with his proofs without amendment ***. *Ross v.*

Philip Morris Co., 164 F. Supp. 683 (W. D. Mo 1958). (emphasis added).

The rules requiring the liberal amendment of the pleadings should not be relaxed in declaratory judgment actions. There is no case law supporting the proposition that Ohio Civ. R. 15 (B) does not apply to declaratory judgment actions. Contrary to the Appeals Court ruling, *Central Motors* does not stand for the proposition that the issues to be determined in a declaratory judgment action must be alleged in the complaint and can not be raised at trial pursuant to Ohio Civ. R. 15 (B). In fact, the *Central Motors* appeals court stated: " *** the issues to be determined in a declaratory judgment action are **as broad or as narrow as the plaintiff desires**. These issues are derived from the allegations of the complaint, the prayer for relief, **and the evidence presented**." *Central Motors*, 63 Ohio App. 2d at 56. Other decisions, including one by the instant Appeals Court, have applied Civ. R. 15 (B) to declaratory judgment actions the same as with other actions. See, e.g., *Meehan v. Smith* (9th App. Dist., Summit County, 1984) Case No. 11178, unreported; *Wayne Lakes Park v. Admin. Of Vet. Affairs* (Ohio App. Darke County, 1985) Case No. 1136, unreported.

C. THE PROPER APPLICATION OF THE OHIO STATUTE OF LIMITATIONS (O.R.C. 713.121) REGARDING PROCEDURAL DUE PROCESS VIOLATIONS IN THE REZONING OF A PRIVATE PROPERTY.

O.R.C. 713.121 provides:

> No action challenging the validity of a zoning ordinance or regulation or of any amendment to such in ordinance or regulation because of a procedural error in the adoption of the ordinance, regulation, or amendment shall be brought more that

> two years after the adoption of the ordinance, regulation, or amendment.

The application of this statute takes on great general and public interest and concerns substantial constitutional issues since it limits a property owners time in which to bring a procedural due process violation under the Ohio or U.S. Constitution. The Appeals Court's application of O.R.C. 713.121 in the instant case sets a dangerous precedent in this regard. In 1992 the Zoning District Map was physically changed at the insistence of one village council member. The changed map redesignated the Undeveloped Land to HSCD Zoning from Commercial Zoning. This 1992 change to the Zoning District Map occurred without notice, public discussion, and without official action or vote by the village planning commission or village council in either 1990 or 1992. The new 1992 version of the Zoning District Map has never been adopted. Since Mr. Scheetz filed suit in 1993 he was well within the two year statute of limitations.

Somehow the Appeals Court reasoned that the O.R.C. 713.121 time frame began running in 1990. This application of 713.121 has the dubious effect of forcing a property owner to bring its claim for procedural errors before such errors occur and before the property owner, could have been aware of the violation. Such an application of this statute would, as in this case, allow a municipality to enact a new zoning ordinance without making any zoning district changes and wait two years to secretly publish a new zoning map redesignating the zoning of various properties. The property owners would then be time barred from attacking the zoning changes. Additionally, an unnoticed and unvoted upon change in zoning could occur and an affected property owner would not even be aware of the change until he or she attempted to use the property for a nonconforming use sometime in the future. If that time is two years after the secretive zoning change has occurred he or she would lose all rights

to bring a cause of action for the procedural errors or procedural due process violations. The Appeals Court's ruling in this case sets dangerous precedents regarding the application of O.R.C. 713.121 that are of great public and general concern to property owners in Ohio. These concerns take on constitutional ramifications since this statute if used as in the instant case can cut off a property owner's procedural due process claims before the property owner is aware of them and before the violation actually occurs.

5. **Proposition of Law No. 5: A cause of action for procedural due process violation or errors in the enactment of a zoning ordinance do not begin to accrue under O.R.C. 713.121 until such time as the infringement of a right arises.**

This Court has repeatedly held that a cause of action does not accrue until actual damage occurs. Typically this is when ones conduct becomes presently injurious. See, e.g., *O'Stricter v. Jim Walter Corporation* (1983), 4 Ohio St. 3d 84, 87 *Children Hospital v. Ohio Department of Public Welfare* (1982), 69 Ohio St. 2d 523, 526, *Teamster Local Union v. City of Youngstown* (1977), 50 Ohio St. 2d 200, 203-204. Mr. Scheetz was not injured by the enactment of the zoning ordinance in 1990 since the zoning ordinance itself did not change the zoning of his property. Mr. Scheetz was first injured in 1992 when the unnoticed, undiscussed and unadopted new zoning district map was first published and illegally applied to his property.

6. **Proposition of Law No. 6: Ohio's "Discovery Rule" regarding the application of statutes of limitations applies to the statute of limitations set out in O.R.C. 713.121.**

Ohio's "Discovery Rule" states:

> "The statute of limitations commences to run when the plaintiff knows or has reason to know of the injury which is the basis of his action. A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." *LRL Property v. Portage Metro Housing Authority* (6th Cir., 1995), 55 F3d 1097, 1107.

Property owners should be given the benefit of Ohio's "Discovery Rule" regarding the improper enactment of an amendment to a zoning ordinance. Otherwise, an ordinance, as in the instant case, could be enacted or amended and the affected property owner, even exercising reasonable diligence, may be unaware of the procedural violation, and would not be able to challenge the same if the two year period had expired.

D. WHETHER A MUNICIPALITY'S ARBITRARY EXCLUSION OF MULTIFAMILY APARTMENT COMPLEXES IS A VIOLATION OF THE U.S. AND OHIO CONSTITUTIONS.

A municipality's arbitrary exclusion of a legitimate housing type is of great general and public interest and involves substantial constitutional issues. Multifamily apartment housing provides a viable housing option for many Ohioans who do not have the financial resources for home ownership or older persons who prefer to rent to avoid the time and energy needed to maintain a house. A municipality should not be permitted to exclude such a legitimate housing type from its boundaries without having a rational basis for doing so. Given the urban sprawl that is common place around Ohio metropolitan areas it becomes increasingly important that suburban municipalities and townships accept their fair share of all

types of legitimate housing and refrain from arbitrarily excluding any type of housing unless they have a rational basis for doing so.

7. **Proposition of Law No. 7: A municipalities exclusion or restriction of a legitimate housing type is unconstitutional when it is arbitrary and not supported by a rational basis.**

The defendant in the instant case readily admits that it has instituted a policy of excluding new multifamily apartment complexes from its territorial limits. Such an exclusion or restriction of a legitimate housing type is unconstitutional when it is arbitrary and not supported by a rational basis. *Gerijo*, 70 Ohio St. 3d at 230; *City of Boca Raton v. Boca Villas Corp.* (1979), 371 So. 2d 154,155; *Henry Meyer Assoc. v. Village of Moreland Hills* (Ohio App. 8th Dist. Dec. 8, 1994), No. 67234, unreported.

CONCLUSION

For the foregoing reasons each of these issues should be considered by this Court.

Respectfully Submitted,

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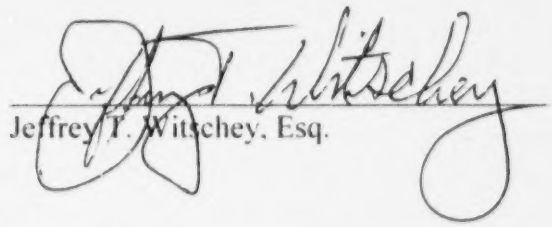
Certification

The foregoing document was delivered to Frederick P. Vergon, Jr., attorney for appellee, 500 National City Tower, 1965 E. 6th St., Cleveland, Ohio 44114 and William B. Young, solicitor for appellee, 230 S. Court St., P.O. Box 220, Medina, Ohio 44258-0220 by regular U.S. Mail this _____ day of _____, 199_____.



Jeffrey T. Witschey, Esq.

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OPPOSITION

BRIEF

(3)

No. 96-1650

Supreme Court, U.S.
FILED
MAY 16 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

STANLEY D. SCHEETZ, TRUSTEE OF THE SEVILLE CORPORATE PARK SUBDIVISION TRUST U/A DATED DECEMBER 1, 1988,

Petitioner,

vs.

THE VILLAGE OF SEVILLE, OHIO,

Respondent.

On Petition for Writ of Certiorari to the Medina County Court of Appeals, Ninth Judicial District of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Petitioner received adequate relief from a lower court in this case because either the application of Ohio's two-part conjunctive test for regulatory "takings" cases follows the decisions of the United States Supreme Court, or the decisions of the Ohio courts in this case satisfy the requirements for a "regulatory takings" analysis as defined by the United States Supreme Court in *Lucas v. South Carolina Coastal Commission.*

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APPENDIX

Appendix A — Plaintiff's Transcript of Proceedings, *Scheetz v. Village of Seville,* in the Medina County Court of Common Pleas, Case No. 93CV1329 ..... 1a

Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the Medina County Appeals Court, Ninth Judicial District of Ohio. The Medina County Court of Appeals opinion (No. 2482-M) is unreported. For the convenience of the Court, all citations to the opinion will be to the copy in the Petitioner's Appendix. Other references will be made to the Petitioner's Appendix and to Respondent's Appendix attached hereto.

STATEMENT OF JURISDICTION

This Court should not exercise jurisdiction over this case under the "takings" clause of the Fifth Amendment of the Constitution. The questions presented for review were decided by the Ohio courts under an analysis that comports with the United States Constitution and the laws of the State of Ohio.

STATEMENT OF THE CASE

Respondent respectfully oppose the petition for writ of certiorari, which conveniently tries to cloud the fact that no regulatory "taking" occurred when the Respondent approved valid zoning requirements for the Petitioner's property. For the most part, the Petition attacks the Ohio courts' use of the Ohio test for regulatory takings. However, the Petition neatly ignores the fact that the Petitioner's claim fails both the Ohio and United States Supreme Court's tests for a "taking."

The Petition claims that the cases *Gerijo, Inc. v. Fairfield*, 70 Ohio St. 3d 223, 638 N.E. 533 (1994), and *Central Motors Corporation v. City of Pepper Pike*, 73 Ohio St. 3d 581, 653 N.E. 2d 639 (1995), use an improper application of a conjunctive test for regulatory takings. The Petition's assertion is false. *Gerijo* and *Central Motors'* requirement that a claimant prove that (1) a regulation does not advance a legitimate state interest;

and (2) the regulation denies an owner economically viable use of his land, follows the spirit of this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992). The conjunctive test follows *Lucas's* allowance for a "takings" test to be shaped by Ohio's police power and its history of property law, particularly zoning law.

Even assuming that the Petition is correct in asserting *Gerijo* and *Central Motors* test should not be used by Ohio courts, the analysis performed by the Medina County Appeals Court and the Medina County Court of Common Pleas provided the Petitioner with adequate relief. Both facets of the Ohio regulatory takings test are identical to the test in *Lucas*. The analysis of both Ohio courts examined the legitimate government interest of the Respondent and found no problems. Likewise, both courts found that the Petitioner had not been deprived of all economic uses of his land. In short, the analysis performed in this case afforded the Petitioner adequate relief because he failed *both* facets of a takings case.

STATEMENT OF FACTS

On December 1, 1988, Petitioner purchased certain undeveloped property in Guilford Township, Ohio. Prior to the purchase of the property, Petitioner acted as attorney for the prior owner and obtained approval from the Medina County Commissioners for annexation of the property into The Village of Seville (hereinafter "Respondent"). At the time the Petitioner purchased the property and it was annexed by the Respondent the property was zoned as Section 6 Commercial District under the Respondent's then applicable zoning code.

On January 1, 1990, the Respondent adopted a comprehensive zoning ordinance. Pursuant to the zoning ordinance, Petitioner's property was zoned as Highway Service Commercial.

On April 19, 1993, Petitioner applied for an amendment to the zoning ordinance for Lot No. 765. He requested that the zoning for Lot 765 be changed from highway commercial to R3 multi-family zoning. After a public hearing, the Respondents denied the Petitioner's application for an amendment.

The Petitioner then filed another application for a zoning amendment dated September 15, 1994 to obtain commercial and multi-family uses as conditionally permitted uses on his property. The Respondent denied this amendment, and later voted to change the zoning to a Commercial District from a Highway Commercial District. The new Highway Commercial classification left the Petitioner with many commercial uses for his property, including gasoline service stations, motels, restaurants, automotive repair shops, signs, and parking lots. However, under this new zoning law, as well as the prior Commercial District zoning no multi-family dwellings were permitted.

A. Prior Proceedings and Disposition

Petitioner first filed his case in the Medina County Common Pleas Court in Ohio. He alleged that an unconstitutional regulatory taking had occurred under the United States and Ohio constitutions. The Petitioner's case went to a bench trial whereupon the trial court filed its final Findings and Order in favor of the Respondent. The trial court found that Petitioner failed to establish both facets of the Ohio conjunctive test and concluded that a proper exercise of Respondent's police power occurred.

Petitioner filed a Notice of Appeal in the Medina County Court of Appeals. Again the Petitioner asserted that the disjunctive test of *Lucas* should apply to his case. The appeals court recognized the Petitioner's argument, yet affirmed the

decision of the trial court because the Petitioner failed to show that either the zoning denied him of all economically viable use of his land, or that the Respondent zoning laws did not advance a legitimate government interest. The appeals court found that the Petitioner had actually been successful in selling significant portions of his property and therefore no economic inviability could be shown. Likewise, the appeals court found that the Petitioner presented no credible evidence at trial to prove that the Respondent did not advance a legitimate interest by zoning the property. Petitioner did not carry his burden, thus he lost on *both* prongs of the takings test.

Petitioner filed a Memorandum in Support of Jurisdiction in the Ohio Supreme Court, which was denied January 15, 1997.

B. Misstatements in the Petition

The opinion of the Medina County Court of Appeals correctly sets forth the facts of this case. Factual findings in that opinion give an accurate depiction of what actually occurred in the case before this Honorable Court. Therefore, in the interests of brevity, Respondent respectfully urges this Court to direct its attention to the appellate court opinion in the Petitioner's Appendix, Exhibit C.

Pursuant to the United States Supreme Court Rule 15.1, Respondent brings the following misstatements of facts contained in the Petition to the Court's attention.

Petitioner misstates the facts when he asserts in the Petition that he has been denied commercial uses that he once had (*see* Petition at second paragraph, p. 2). As the Medina County Court of Appeals noted in its opinion, the Petitioner was not denied "uses that he once had" because the ability to use his property for multi-family dwellings was a *conditional* use under the

existing commercial zoning. Special approval would have been necessary for such a use, and no approval could be gained by the Petitioner.

Petitioner further misstates the facts by his own admission. Again, in paragraph 2 of the Petition, he asserts that he has been denied *all* economically viable use. Yet, Petitioner also admits that he sold a parcel of his property to Hardees and that other parcels were sold, but not "at arm's length." Petitioner's turn of phrase "at arm's length" means that he was unable to sell the property because of the existing market conditions in the area. The fact remains that Petitioner admits that he sold some of his property, and that he could still sell other portions of his land.

REASONS FOR DENYING THE WRIT

I.

THE OHIO CONJUNCTIVE TEST FOR REGULATORY "TAKINGS" CASES FOLLOWS THE DECISIONS OF THE UNITED STATES SUPREME COURT BECAUSE IT FOLLOWS THE HISTORY OF OHIO PROPERTY LAW, THUS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

The conjunctive test as used in *Gerijo, Inc. v. Fairfield*, 70 Ohio St. 3d 223, 638 N.E. 533 (1994), and *Central Motors Corporation v. City of Pepper Pike*, 73 Ohio St. 3d 581, 653 N.E. 2d 639 (1995), establishes that property owners who challenge a state zoning regulation must prove that (1) they have been denied all economically viable use of the property; and (2) the zoning does not advance a legitimate government interest. The federal test, as enumerated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), sets forth a disjunctive test for regulatory "takings" cases. This test

requires that a property owner prove either economic inviability or failure to advance a legitimate government purpose. While on its face *Lucas* might seem to be apposite to the decisions of the Ohio Supreme Court, the decision in *Lucas* and cases prior to it support Ohio's conjunctive requirement for regulatory taking cases.

Gerijo and *Central Motors* follow the history of Ohio property law regarding zoning ordinances. Ohio property law grants a presumption of validity to zoning ordinances, finding that such ordinances are a proper exercise of the state's police power. *Gerijo* at 226; *See also Downing v. Cook*, 69 Ohio St. 2d 149, 431 N.E. 995 (1982); *Brown v. Cleveland*, 66 Ohio St. 2d 93, 420 N.E. 2d 103 (1981).

In *Lucas*, this Court recognized that an owner's "reasonable expectations" regarding the property must be shaped by each state's law of property. 505 U.S. at 112 S. Ct. at 2894 (footnote 7). Likewise, in *Euclid v. Amber Realty Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926), this Court found that restrictions on multi-family dwellings and other structures are within the proper array of police powers exercised by a state, and more specifically Ohio.

Because this Court recognizes the restriction of multi-family dwellings and other structures as a legitimate exercise of police power, this Court must also recognize that such restrictions are also advancing a legitimate state interest in a state which has a history of a presumption in favor of those types of zoning ordinances. As stated earlier, Ohio has a long history of a presumption in favor of zoning ordinances. *See Downing v. Cook*, 69 Ohio St. 2d 149, 431 N.E. 995 (1982); *Brown v. Cleveland*, 66 Ohio St. 2d 93, 420 N.E. 2d 103 (1981).

Therefore, Ohio must be allowed to apply a conjuctive test

and require a claimant to prove both of the prongs of the *Lucas* test so that the state's history of zoning law may be continued. The recognition of an individual state's property law history in *Lucas*, and the specific holding of *Amber Realty*, must lead to the conclusion that this Court can and will allow the courts of Ohio to continue to use the conjunctive test because of Ohio's presumption in favor of zoning laws. In a state where there is a presumption in favor of zoning requirements, a property owner must "reasonably expect" that his land will be affected by zoning laws.

II.

OHIO'S "BEYOND FAIR DEBATE" STANDARD FOR REGULATORY TAKINGS CASES FOLLOWS THE DECISIONS OF THE UNITED STATES SUPREME COURT.

The "beyond fair debate" standard, as enumerated by the Ohio Supreme Court in *Gerijo, Inc. v. Fairfield*, 70 Ohio St. 3d 223, 638 N.E. 533 (1994), follows the language of this court in *Euclid v. Amber Realty Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926). In *Euclid*, this Court recognized that the language "beyond fair debate" was proper in regulatory takings cases. Likewise, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), this Court followed the "fairly debatable" language that was used in *Amber Realty*. Unlike the Petitioner's assertion, Ohio property owners do not have to satisfy a criminal standard in regulatory takings cases. As stated before, Ohio has a presumption in favor of zoning ordinances like the one at issue in this case. Thus, the standard for overturning a zoning ordinance must be high. Yet, as the evidence shows, even a lower standard in this case would have resulted in the failure of the Petitioner's claim.

III.

EVEN ASSUMING THAT THE OHIO CONJUNCTIVE TEST FOR "TAKINGS" CASES IS INVALID, THE STATE COURT DECISIONS IN THIS CASE PROVIDED THE PETITIONER WITH ADEQUATE RELIEF AND THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. If Adequate Relief Has Been Obtained By A Petitioner In A Lower Court, The United States Supreme Court Should Dismiss A Petition For Writ Of Certiorari.

The United State Supreme Court has absolute discretion to determine if a petition for writ of certiorari should be granted. *Forsyth v. City of Hammond*, 166 U.S. 506, 17 S. Ct. 665 (1897). In *Forsyth*, Justice David Brewer noted that this Court's discretion for granting a writ of certiorari should be "sparingly exercised." 166 U.S. at 514, 17 S. Ct. at 669. Rule 20(1), of the Supreme Court Rules follows this reasoning and states that:

> Issuance of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of such a writ, the petition must show that the writ will be in aid of the Court's appellate's jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and ***that adequate relief cannot be obtained in any other form or from any other court.***

Sup. Ct. R. 20 (emphasis added).

B. The Petitioner Could Not Prove Either That He Had Been Denied All Economically Viable Uses Of His Land Or That The Respondent's Zoning Ordinance Did Not Advance A Legitimate Public Purpose, Therefore Petitioner Received Adequate Relief And His Petition For Writ Of Certiorari Should Be Denied.

Even assuming that the Ohio test for regulatory takings does not exactly follow this Court's decision in *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), Petitioner received adequate constitutional protection and relief from the analysis of the both the Medina County Court of Common Pleas and the Medina County Court of Appeals. The analysis performed by both courts examined the questions of (1) whether the Petitioner was denied all economically viable use of his property; and (2) whether the Respondent's zoning ordinance advanced a legitimate state interest. Under each facet of the analysis, the Petitioner *failed*. As such, review by this court under a disjunctive test would provide no more constitutional relief than that which has already been provided to the Petitioner because the Petitioner would fail both a conjunctive *and* disjunctive analysis for regulatory "takings" cases.

Regulatory "takings" cases brought under the Fifth Amendment have a long and storied history in our country. Courts have always sought to strike the proper balance between the legitimate police power of the state and a property owner's right to be compensated for land that is deprived of economic use. This Court began its analysis in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158 (1922), when Justice Oliver Wendell Holmes recognized that if a government regulation goes too far it will be recognized as a taking.

Years later, the test for determining what exactly "too far"

meant started to become apparent in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646 (1978). The City of New York had designated Central Station as a landmark, not subject to destruction or exterior modification without review by the New York City Landmark Commission. *Id.* The station wanted to raise money by selling the area above the station for the building of a skyscraper, but the commission denied approval for the plan. *Id.*

This Court upheld New York City's ordinance, finding that no taking occurred under the Fifth Amendment. Several factors of analysis were enumerated, including: (1) the economic impact of a regulation on the plaintiff; (2) the extent to which the regulation has interfered with "distinct investment backed expectations"; (3) the character of the governmental action; (4) whether the ordinance prevented a reasonable use of th property; (5) whether the ordinance is reasonably necessary to effect a substantial public purpose; (6) whether the owners of the property received a benefit commensurate with the burden of the regulation; and (7) whether the landowner secured an "average reciprocity of advantage" compared to other landowners. *Id.*

The multi-factor approach of *Penn Central* remained the standard until this Court altered the analysis for a "takings" decision in *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 112 S. Ct. 2886 (1992). *Lucas* built upon *Penn Central*, and the prior decisions of *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138 (1980)[1], and *Keystone Bituminous Coal*

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1. In *Agins*, this Court used a two prong disjunctive test like the one used in *Lucas* to determine that the city's open-space land zoning ordinances, which restricted a previously purchased five-acre tract of land to single-family residences and open-space use, did not take the property without just compensation, where the zoning permitted construction of one to five

(Cont'd)

Assn. v. DeBenedictis, 480 U.S. 470, 107 S. Ct. 1232 (1987).[2] In *Lucas*, this Court continued to follow the multi-factored approach of *Penn Central*. However, a new minimum standard recognized that, at the very least, a regulatory taking occurs when a claimant has been deprived of *all* economically viable uses for her/his property. *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 112 S. Ct. 2886 (1992). This minimum standard remains unless (1) the regulation prevents a nuisance; or (2) there is some feature in state law under which an owner should have recognized that the state could prevent development.[3] *Id.*

To implement the minimum standard of *Lucas*, this Court fashioned a two prong test which found a violation of the Fifth Amendment if a regulation (1) denies an owner all economically viable use of his land; or (2) does not substantially advance a legitimate state interest. *Id.* Under this test, the claimant in *Lucas* proved to this Court that he had been deprived all economically viable use of his beachfront property, without ever having to address the methodology of South Carolina's statute. *Id.* In short,

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(Cont'd)
residences on the land, advanced legitimate government goals, would benefit the landowners as well as the public by assuring careful and orderly development, and neither prevented the best use of the land or extinguished a fundamental attribute of ownership.

2. In *Keystone*, this Court held that a statute which required coal companies to leave undisturbed 50 percent of the coal beneath the surface of land supporting structures was constitional. This ruling came in spite of the fact that the statute required coal companies to leave about 27 million tons of coal in place and deprived them of all value of the support estate that they had previously purchased from the owners of the surface.

3. These exceptions in *Lucas* are not at issue, since neither "nuisance" or the legitimacy of the Respondents' zoning regulation is at issue in this Petition.

this Court established that a property owner could prove a taking without ever having to prove that the state's legitimate interest were not advanced by the chosen regulation. *Id.* A claimant need only prove the economic factors mentioned in *Penn Central* to show that her/his property has been deprived of *all* economically viable uses under *Lucas*. *Id.*

The Petitioner can draw no distinction between the Ohio and *Lucas* tests for economic viability. On their face the tests are the same. Ohio's test includes both an analysis of (1) whether a property owner has been deprived of all economically viable use of her/his land; and (2) whether the state's regulation advances a legitimate state interest. *Gerijo, Inc. v. Fairfield*, 70 Ohio St. 3d 223, 638 N.E. 533 (1994), and *Central Motors Corporation v. City of Pepper Pike*, 73 Ohio St. 3d 581, 653 N.E.2d 639 (1995). As stated before, *Lucas* sets out the same words.

The analysis conducted under the Ohio test and the *Lucas* test is identical. Under both tests, the burden is on the Plaintiff to prove that her/his property has been rendered economically inviable. *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3 d 223, 638 N.E. 533 (1994); and *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 112 S. Ct. 2886 (1992). The language of both tests is also similar. As the Ohio Supreme Court stated in *Gerijo*, "A zoning ordinance denies a property owner an economically viable use if it denies an owner all uses except those which are highly unlikely or practically impossible under the circumstances." 70 Ohio St. 3d at 228, 638 N.E. 2d at 537-538. In this way, the *Gerijo* court followed the analysis of this Court in *Penn Central* and *Lucas* by finding that opportunity loss for the most economically viable use is *not* an usurpation of a property owner's investment backed expectations.[4] Rather, under

4. Under both the Ohio and *Lucas* forms of analysis, a decision to bar the most effective use is not a taking. Under both tests, barring the most (Cont'd)

each of these tests *all* economically viable uses must be taken from the claimant's property. *Id.*

As applied in the Petitioner's case, the Ohio and *Lucas* test for economic viability are the same. In *Lucas*, this Court stated that for there to be a taking it must be evident that, ". . . the owner of real property has been called upon to sacrifice ***all*** economically beneficial uses in the name of the common good, that is, to leave [the] property economically idle . . ." 505 U.S. at 1019, 112 S. Ct. at 2895. (Emphasis included in the original). The following language from the Medina County Court of Appeals evidences a similar analysis in the Petitioner's case:

> The evidence before the trial court demonstrated that Scheetz had been able to sell substantial portions of the property. Although he had been unsuccessful in his attempts to sell the remaining portions of the property, it was unclear whether the market might improve over time. Moreover, Scheetz had not exhausted the full range of permissible highway service commercial uses. Rather, he had concentrated his marketing efforts on large fast food and full service restaurant chains. Because he had apparently made no attempts to sell the property for use as an automotive repair shop

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(Cont'd)

effective use of the space above Grand Central Station-building a skyscraper on top of it-would not be a taking. *See generally Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646 (1978). Likewise, this court did not recognize a "most viable use" argument in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232 (1987), even though the most economically viable use of the land would have been the complete removal of coal from the land.

> or any of the other uses permitted in the highway service commercial district, ***he did not establish that he had been deprived of an economically viable use of his property.***

(Petitioner's Appendix, Exhibit F, pp. 5-6) (emphasis added).[5]

The preceding passage from the appeals court opinion shows that the Petitioner would not have survived the economic viability test as applied in *Lucas*. In fact, if the claimant in *Lucas* had been allowed to sell his beachfront property to a fast-food chain, it is certain that his case never would have reached this Court for review.[6] Likewise, even though Petitioner claims that he was denied the right to build multi-family dwellings, his land was not deprived of all of its prior uses.[7] Under *Lucas* and other decisions of this court, such a partial deprivation is not a "taking." *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646 (1978); and *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232 (1987).

---

5. Other facts presented at trial showed that the Petitioner was not denied all economically viable uses of his land. Petitioner's expert land use planner, Mr. Majewski, testified that a portion of the property adjacent to the property owned by the Petitioner was in Guilford Township and that Guilford Township's zoning allowed at least 30 uses. Even with the greater number of uses, other than two parcels, the Guilford Township property is undeveloped. (Respondent's Appendix, Exhibit A, pp. 314, 315). As such, no denial of an "average reciprocity of advantage could be made under *Lucas* or under the multi-factored approach of *Penn Central*.

6. Petitioner admitted in his Petition to this Court that he had sold a parcel of land to "Hardees" and other buyers. (*See* Petition at second paragraph, p. 2).

7. The building of multi-family dwellings is a use that the Petitioner claims was taken from him. Yet, Petitioner shies away from the fact that under the Respondents'original zoning plan, multi-family dwellings were a *conditional* use and, at best, speculative.

Petitioner failed the second prong of the *Lucas* test at both at trial and on appeal in the Ohio courts. At trial, the Medina County Court of Common Pleas found that Respondent presented numerous reasons for its zoning decision, including traffic patterns, impact of taxes, noise, storage problems, utility and crime. (Respondent's Appendix, Exhibit A, pp. 333-334). Evidence also established that the Respondent had a legitimate interest in preventing the development of multi-family dwellings in the area. (Respondents' Appendix, Exhibit A, pp. 480-482). Furthermore, the Medina County Court of Appeals noted that the Petitioner did not argue that the interests of the Respondent were not legitimate. (*See* Petitioner's Appendix, Exhibit C, p. 7). Petitioner only attacked the evidence that the Village presented to support the fact that the zoning regulations did advance those interests. (*See* Petitioner's Appendix, Exhibit C, p. 7). The appeals court noted that there was competent, credible evidence to support the trial court's determination that the Respondent's ordinance did in fact advance the interests mentioned above. *See* Petitioner's Appendix, Exhibit C, p. 7).

Petitioner's claim should also fail the second prong in *Lucas* because this Court has recognized that zoning regulations like those put forth in in the Respondents' ordinance are a proper method for advancing legitimate state interests. In *Euclid v. Amber Realty Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926), this Court recognized that another Ohio zoning regulation, which limited multi-family dwellings, legitimately advanced state interests like those at issue in this case. Likewise, in *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138 (1980), this Court noted that zoning regulations which prevented unwanted urbanization advanced legitimate state interests. In short, the commercial highway district employed by the Respondent should be upheld because it is nearly identical to the regulations used in *Agins* and *Amber Realty* to curb the effects of over crowding, traffic congestion, taxpact and the like.

CONCLUSION

For the aforementioned reasons the Petitioner's petition for a writ for certiorari should be denied.

Respectfully submitted,

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APPENDIX A — PLAINTIFF'S TRANSCRIPT OF PROCEEDINGS, *SCHEETZ V. VILLAGE OF SEVILLE,* IN THE MEDINA COUNTY COURT OF COMMON PLEAS, CASE NO. 93CV1329

State of Ohio,)

County of Medina,)

IN THE COURT OF COMMON PLEAS

Case No. 93-CIV-1329

Stanley D. Scheetz, Trustee,

Plaintiff

vs.

Village of Seville, Ohio,

Defendant.

PLAINTIFF'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

NICHOLAS T. GEORGE & ASSOCIATES

by Jeffrey Witschey, Esq.,

Attorney on behalf of the Plaintiff.

WILLIAM YOUNG, ESQ. LAW DIRECTOR

SMITH, MARSHALL & WEAVER

by Frederick P. Vergon, Jr., Esq.,

Attorneys on behalf of the Defendant.

Appendix A

[Commencing at page 314]

district, or cannot go there?

A. They cannot. The road has been approved, has not been completed. It is anticipated that the road will be completed. It has been platted and approved by the village.

Q. But never completed, is that right?

A. Correct.

Q. You also indicated one of the basis for your opinion was you felt that the property over here in Guilford Township might be more appropriate for highway commercial use, am I stating your position correctly?

A. Yes, it is more attractive to be useful to the highway traveler.

Q. At the present time, that is Guilford Township, and the Village of Seville has no jurisdiction over that land?

A. Yes.

Q. You indicated there is a service station over here?

A. Not in that quadrant, in the southeast quadrant.

Q. This land up here, which you say is more appropriate for highway commercial, is zoned what?

A. It is my understanding it is zoned commercial district in the Guilford Township code.

Q. Approximately how many uses are allowed under the Guilford Township commercial district?

A. I don't know the exact number. As I recall looking at the code, there are a significant number of uses.

Appendix A

[315]

Q. I think you said on direct-examination, about thirty?

A. I think so.

Q. Of those thirty uses, were highway commercial type uses permitted?

A. I can't tell you for sure, I have to look.

Q. Even though Guilford Township allowed thirty different uses for that property or land in Guilford Township, there is no development on that land?

A. There is two buildings on that land, yes.

Q. What is on there?

A. I think one is a plastics company, and another building that is vacant. It looks like it was a gas station at one time.

Q. Other than the plastics company, the land in Guilford Township is undeveloped?

A. I believe so, yes.

Q. Just because land is undeveloped doesn't mean its zoning is improper, does it?

A. No. It may be undeveloped because zoning is improper.

Q. Just because it is undeveloped could be because of a number of factors?

A. Yes.

Q. Just because it is undeveloped doesn't mean there is something wrong with the zoning?

A. Correct.

Appendix A

* * *

[333]

true?

A. Yes.

Q. And it doesn't necessarily mean one is right or wrong?

A. It may.

Q. Are you aware that, I think you are, that the area up here to the western end of the highway commercial is now multi-family?

A. Yes.

Q. This area off Greenwich Road is multi-family?

A. Yes.

Q. And this area down here, I think apartments are multi-family?

A. Yes.

Q. Did you come to any idea how old these two developments, or three developments are?

A. I believe, no, I don't know. I know the northerly one is under construction, so it is brand new.

The one just north of Greenwich Road can't be more than five or six years old.

The one south, I can't say.

Q. In the last five years, there have been at least two developments that are multi-family?

A. That appears to be the case.

Q. Is it a legitimate concern of a village or municipality as to the ratio of multi-family to single family homes or [334] residences?

A. It is an issue that should be researched.

Q. Is it also a legitimate issue as to the ratio between renter occupied units and owner occupied units in a municipality?

A. If the community suspects there is an issue there, they should look into it and see if they can substantiate problems.

MR. VERGON: Thank you, Mr. Majewski.

THE COURT: Any redirect, we will do it in the morning.

MR. WITSCHEY: Tomorrow morning?

THE COURT: Yes. It is twenty-five of, and I have to get out of here.

MR. WITSCHEY: I can probably do it in five minutes.

THE COURT: I don't have that much time, I have to meet some people.

You will have, one way or the other, Mr. — what is his name?

MR. WITSCHEY: Sharpnack.

THE COURT: In the morning first thing.

Appendix A

If you can do what you are talking about in five minutes, it won't hurt him to wait five minutes.

See you in the morning at nine o'clock.

* * *

[480] The second one was even more on point, in that it refers to establishing population densities to prevent or reduce congestion, and I believe this is the important language, to secure economy in the cost of providing water supply and sewerage systems, streets and highways, fire and police protection, schools, parks and recreation facilities, and other governmental services.

The purpose statements go on to refer to fostering well planned industrial, commercial growth, and protecting developments from the detrimental effects of incompatible surrounding uses.

When I look at these statements of public purpose, which I think are very legitimate, reasonable statements that one might find in a zoning ordinance, and I look at this property in relationship to development throughout the community, it occurs to me that to permit multi-family uses in this particular area would result in those uses being isolated from the main part of the community, the main residential areas of the community, thereby running contrary to this public purpose of economy in the cost of providing services.

That is when you have a residential area that is isolated from other residential areas, it creates inefficiencies in delivery of services for things such as police and fire services, when you have one smaller area [481] isolated from other areas.

Appendix A

When you look at the pattern of development, and the location of the residential population in this community, it is oriented, with the exception of one property, entirely to the south of the interstate, and there are several areas there that show, even the location of the multi-family zones, which are further south along Route 3, south of the interstate area.

Q. Let me interrupt you, Greg, if I may.

On the map is the yellow, the residential area?

A. Yes, I believe yellow is the single family residential area, and the green, I think, is the multi-family zoned areas.

Q. With the exception of this green area, and the little green area up here, is it fair to say all the residential property in Seville is south of Greenwich Road?

A. Yes.

Q. Is that what you mean by isolation?

A. Yes.

What I conclude, while other communities may have chosen to include multi-family along interstate interchange areas, I believe, given the statement of purposes in the zoning code, and the particular facts surrounding this community, it is reasonable for this community to conclude in this particular case multi-family should not occur as [482] part of that highway commercial district.

Q. One of the claims is the highway commercial district is too

large, or extends too far off State Route 3. Are you aware of that?

A. Yes, I am aware of that claim.

Q. Do you have an opinion as to the extent of the highway commercial district in this case?

A. Yes, I do.

Q. What is that?

A. My opinion is that the highway commercial district, in this case, is not too large, it is not too far away from the interstate, and, in fact, is very similar to what you find in other communities that have the same issue.

Q. Have you, as part of your work on this case, Mr. Dale, done any investigation as to other interstate intersections in the State of Ohio?

A. Yes.

Q. Could you tell the Court what investigation you have done?

A. First of all, I want to indicate, like many people, I am a frequent interstate traveler. I am aware generally of the configuration of interstate interchanges, particularly with regard to my planning and zoning background.

My initial reaction to this is that there was nothing particularly unusual about the distance of this property . . . .

* * *

Supreme Court, U.S.
FILED
JUN 12 1997
OFFICE OF THE CLERK

No. 96-1650

In The

Supreme Court of the United States

October Term, 1996

STANLEY D. SCHEETZ, TRUSTEE OF THE SEVILLE CORPORATE PARK SUBDIVISION TRUST U/A DATED DECEMBER 1, 1988,

Petitioner,

v.

THE VILLAGE OF SEVILLE, OHIO,

Respondent.

On Petition For Writ Of Certiorari To The Medina County Appeals Court, Ninth Judicial District Of Ohio

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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15 pp

QUESTION PRESENTED FOR REVIEW

Is it proper for Ohio Courts to refuse to recognize an Ohio private property owner's United States Constitution, Fifth Amendment "takings" rights as pronounced by the United States Supreme Court and instead recognize only Ohio State Constitutional "takings" rights as pronounced by the Ohio Supreme Court when the Ohio "takings" rights offer the private property owner less constitutional protection than the Federal "takings" rights?

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

I. Misstatements in Respondent's Statement of Case.

A. Ohio's conjunctive test does not follow the spirit of Lucas.

The Respondent is mistaken when it states that the Ohio conjunctive test " * * * follows the spirit of this court's decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886 (1992)". (Brief in Opp. p. 2). This honorable Court in *Lucas* and *Agins v. City of Tiburon,* 447 U.S. 255, 100 S. Ct. 2138 (1980) adopted a disjunctive test to provide property owners compensation when their property is taken. A plain reading of the Takings Clause of the Fifth Amendment requires compensation for a taking whether a legitimate government interest is advanced or not. Ohio's conjunctive test leaves a property owner without compensation where such owner has sacrificed the economic viability of his property to advance a legitimate government purpose.

Respondent is again mistaken when it states: "Both facets of the Ohio regulatory takings test are identical to the test in Lucas." (Brief in Opp. p. 2). This is not true because the Federal test requires the Trial Court to consider a property owner's investment back expectations in determining the economic viability prong. No such consideration is required under the Ohio conjunctive test.

B. Petitioner was not afforded adequate relief by the Ohio Courts.

Respondent argues that: " * * * the analysis performed in this case afforded the Petitioner adequate relief

because he failed both facets of a takings case." (Brief in Opp. p. 2). Respondent's assertion is false because the Trial Court applied the wrong test. The Trial Court never considered Mr. Scheetz' investment backed expectations when analyzing the economic viability prong of the test.

II. Misstatements in Respondent's Statement of Facts.

A. Respondent never changed the zoning from highway commercial to commercial prior to litigation.

Respondent states: "The Respondent denied this amendment, and later voted to change the zoning to a commercial district from a highway commercial district." (Brief in Opp. p. 3). This assertion is false. The Village of Seville never changed the zoning of Mr. Scheetz' Undeveloped Land to commercial from highway commercial.

B. Ohio Courts only applied the conjunctive test.

By Respondent's own admission, the Trial Court applied only the conjunctive test (Brief in Opp. at 3d paragraph, p. 3). Respondent again misstates the facts when it asserts that the Appeals Court recognized Mr. Scheetz' argument for *Lucas'* disjunctive test, but affirmed the Trial Court's decision. (Brief in Opp. at 4th paragraph, p. 3-4). The Appeals Court applied Ohio's conjunctive test as set forth in *Gerijo, Inc. v. Fairfield*, 70 Ohio St. 3d 223, 638 N.E. 2d 533 (1994). See Decision and Journal Entry of the Medina County Court of Appeals marked as *Exhibit C* to the Petitioner's Appendix.

III. Respondent's Reasons for Denying *Writ* of *Certiorari* are without merit.

A. Respondent's interpretation of Lucas is without merit.

Respondent argues that *Lucas* requires the property owner's reasonable expectations to be shaped by each state's property laws. (Brief in Opp., at 3d paragraph, p. 6). Assuming *arguendo*, that Respondent is correct, Ohio Law would preempt Federal Constitutional rights merely because it is the history of Ohio property law to do so. Under Respondent's argument, even though Ohio law violates an individual's United States Constitutional rights, such laws should be upheld because they are state law tradition.

B. A presumption in favor of zoning laws is not conclusive proof that the zoning law is constitutional.

Respondent argues that in a state where there is a presumption in favor of zoning requirements, a property owner must "reasonably expect" that his land would be affected by zoning laws. (Brief in Opp., 1st paragraph p. 7.) While this is certainly true, a property owner should also reasonably expect that if the government changes the zoning such that the land owner has lost the economic viability of his property, he should be compensated for the loss of such property.

IV. The "Beyond a Fair Debate" Standard.

Respondent states: "Unlike the petitioner's assertion, Ohio property owners do not have to satisfy a criminal

standard in regulatory taking cases." (Brief in Opp., 2nd paragraph, p. 7). Respondent is wrong. The Ohio Supreme Court itself stated in *Central Motors Corporation v. City of Pepperpike*, 73 Ohio St. 3d 581, 584, 653 N.E. 2d 634 (1995), that: "This court has stated that there is **little difference between the 'beyond fair debate' standard and the 'beyond reasonable doubt' standard**". By the Ohio Supreme Court's own admission, Ohio property owners have to prove their constitutional "takings" rights by a standard substantially similar to the standard used in criminal cases in Ohio.

V. Mr. Scheetz satisfies the requirements of the United States Supreme Court Rules.

Respondent incorrectly asserts that Mr. Scheetz should be denied a *writ* of *certiorari* because Mr. Scheetz does not meet the requirements of United States Supreme Court R. 20. (Brief in Opp. At p. 8). This rule concerns "extraordinary *writs*" as set forth in the Supreme Court Rules and not *writs* of *certiorari*. Mr. Scheetz meets the requirements of United States Supreme Court Rule 10 concerning *writs* of *certiorari* since the Ohio Supreme Court has decided an important federal question in a way that conflicts with relevant decisions of this honorable Court.

The Ohio Supreme Court has ignored the mandates of the Supremacy Clause of the United States Constitution, and the holdings of the United States Supreme Court in cases such as *Agins* and *Lucas*. This case provides this Court the opportunity to remind the Ohio State Supreme Court that the United States Constitution, and

this honorable Court's decisions, are the Supreme Law of the Land.

VI. The Ohio Appeals Courts have requested that the Ohio Supreme Court reconsider its *Gerijo* and *Central Motors* cases since these cases conflict with this honorable Court's prior decisions.

Ohio Appellate Courts have urged the Ohio Supreme Court to resolve the conflict between its decisions and the decisions of the United States Supreme Court. The Clermont County Appeals Court stated:

> The apparent conflict between the conjunctive test adopted in Gerijo and the disjunctive test employed in *Agins* and *Lucas* places this court in a difficult position. On one hand, state courts are bound to follow guidelines which the United States Supreme Court has set up on facts involving federal constitutional questions * * * On the other hand, this court has no authority to overrule the Ohio Supreme Court, and is, accordingly, bound by and must follow decisions of the Ohio Supreme Court, which are regarded as law unless reversed or overruled * * * After much consideration, this court will follow the Ohio Supreme Court judgment in *Gerijo*. **This court, however, expressly invites the Supreme Court to reconsider its decision in *Gerijo*, or explain why the conjunctive test adopted in *Gerijo* is not in conflict with the United States Supreme Court decisions in *Agins* and *Lucas*.** *Rumpke Road Development Corporation v. Union Township Board of Trustees* (Clermont County 1996), WL 622602, unreported. (Emphasis added).

The Trial Court in *Spires v. Village of Baltimore* (Fairfield County, 1996), WL 363431, unreported, noted that the analysis used in *Gerijo* demonstrated that the Ohio Supreme Court had abandoned the proper constitutional principals pronounced by the United States Supreme Court in *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed. 2d 106 (1980). The trial court followed the *Agins* standard and found for the property owner. The Appeals Court then reversed stating: "The Trial Court is obligated to follow the law set forth by this state's highest Court, as are we." *Spires* at 2.

The appeals court in *Kuhn v. Board of Commissioners of Hamilton County* (Hamilton County, 1996) WL 134464, unreported, found that a zoning ordinance had stripped a property owner's land of any economically feasible use. Under the federal test, the property owner would have prevailed. However, the court ruled against him because as the court noted:

> We are constrained by the difficult burden of proof The [Ohio] Supreme Court has placed upon those attacking the constitutionality of a zoning ordinance * * * . Since appellants failed to meet their burden of proof on the other prong of the test, **we must reluctantly affirm the judgment of the trial court even though we believe that the zoning is confiscatory.**" *Kuhn* at 3-4. (Emphasis added).

In a similar case, *U.S. Cement Company v. Poland Township Board of Trustees*, (Mahoning County 1994) WL 650238, unreported, the appellate court recognized that a property owner had a meritorious claim that a zoning ordinance had stripped his land of any economically

viable use. But once again, the court was forced to deny the property owner's claim for relief because " * * * The [Ohio] Supreme Court has ruled that the party attacking the zoning ordnance must prove *both* elements of the test beyond fair debate. **This is almost an impossible hurdle to overcome.**" *U.S. Cement Company* at 6. (Emphases added).

Ohio law leaves property owners helpless against confiscatory zoning ordinances. The dissenters in *Gerijo* even stated:

> It is hard to imagine the zoning scheme that would not pass the majority's conjunctive test. Fortunately the U. S. Supreme Court has provided a test that provides affected land owners with refuge from unreasonable governmental action. *Gerijo* at 231.

The pleas of Ohio Appellate Courts, the dissenting justices in the *Gerijo* and *Central Motors* cases and Ohio land owners should be responded to by this honorable Court.

VII. Respondent's argument that Mr. Scheetz would not succeed under the federal disjunctive test is mere speculation and provides no basis to prevent this Court from granting *certiorari*.

Respondent's argument that Mr. Scheetz would fail the federal disjunctive test (Brief in Opp. p. 9) is rank speculation. The Respondent improperly assumes that since Mr. Scheetz failed both facets of the Ohio conjunctive test, it would by definition fail the federal disjunctive test set forth in *Lucas*. The Trial Court in applying the Ohio test was not required to consider Mr. Scheetz'

investment-backed expectations with respect to his purchase and development of the property. Had the Trial Court considered his investment-backed expectations, Mr. Scheetz quite likely would have satisfied the first prong of the Ohio and Federal Tests.

VIII. The Trial Court never considered Mr. Scheetz' investment-backed expectations.

In *Penn Central,* this Court expressly stated that one factor to be examined is the " * * * extent to which the regulation has interfered with distinct investment back expectations". *Penn Central Transportation Co., v. City of New York,* 438 U.S. 104, 98 S. Ct. 2646 (1978).

When Mr. Scheetz purchased the property it was zoned for "all" commercial uses. Relying on this, he made substantial investments in infrastructure improvements capable of handling a wide variety of commercial uses. After the zoning ordinance was changed, Mr. Scheetz only had four uses available for Undeveloped Land. Thus, he lost nearly all of the land's original investment opportunities and the value of his infrastructure improvements. The Trial Court failed to consider Mr. Scheetz' investment-backed expectations and sustained objections to evidence Mr. Scheetz proffered to prove his investments in the Undeveloped Land.

IX. Mr. Scheetz never argued that his undeveloped Land had been taken because it could not be used for its best use.

Respondent attempts to recast Mr. Scheetz' argument by implying that Mr. Scheetz is asserting that the Undeveloped Land has been taken since the Respondent has denied the property's "highest and best use" or most "effective or efficient" use. (Brief in Opp. at 2d paragraph, p. 13). This is not true. Mr. Scheetz only asserts that the Zoning Ordinance has deprived him of the practical uses of the Undeveloped Land that he once had. What the property's "highest use" would be is irrelevant to the instant appeal.

X. Mr. Scheetz never argued that his Undeveloped Land had been taken because it could not be used for multi-family dwellings.

Mr. Scheetz never argued that his land was deprived of all economic viability because he was denied the right to build multi-family dwellings.[1]

---

[1] The factual inaccuracies contained in Respondent's Brief are revealed in the record. Mr. Scheetz is not requesting this honorable Court to decide issues of fact.

CONCLUSION

This case presents important United States Constitutional issues concerning the balance of federal power and control over unreasonable state action. For the aforementioned reasons, Mr. Scheetz' petition for a *writ* of *certiorari* should be granted.

Respectfully submitted,

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